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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STEVEN B. BARGER,	: 17-CV-4869(FB)
Plaintiff,	
-against-	: United States Courthouse
	Brooklyn, New York
FIRST DATA CORPORATION, et	
al.,	: Friday, September 20, 2019
Defendants.	10:00 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR JURY TRIAL
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES SENIOR DISTRICT JUDGE, AND A JURY.

A P P E A R A N C E S:

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1 A P P E A R A N C E S: (Continued.)
2

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15 330 Madison Avenue
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23 Proceedings recorded by computerized stenography. Transcript
24 produced by Computer-aided Transcription.

PROCEEDINGS

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1 (Open court; no jury present.)

2 (Time noted: 10:03 a.m.)

3

4 THE COURTROOM DEPUTY: All Rise. Civil cause on
5 trial, *Barger v. First Data*. All parties and counsel are
6 present.

7 THE COURT: So the jurors are all here. And
8 they've been very responsive, so that's good to know. And
9 we're going to try to wrestle down the charge, give you
10 something at lunch time. We're okay time-wise, we have the
11 whole weekend. I'm sorry we have the whole weekend, it
12 would be better for you to get the case done today and go
13 out for the weekend. Such is the lot of the litigator,
14 right?

15 MR. EIDELMAN: That's just the life, Judge.

16 THE COURT: Mr. DiLorenzo.

17 MR. DILORENZO: The Labor Section is meeting at
18 Cornell, I canceled that meeting.

19 THE COURT: You can watch another one of my
20 podcasts in your free time. I'm going to try to drink some
21 coffee while you continue the trial. Let's bring the jurors
22 in.

23 COURTROOM DEPUTY: Mr. Barger, you can take the
24 witness stand.

25 (Whereupon, the witness resumes the stand.)

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1 COURTROOM DEPUTY: We're still waiting for juror
2 number seven.

3 (Jury enters the courtroom.)

4 COURTROOM DEPUTY: I remind the witness you are
5 still under oath.

6 THE WITNESS: Thank you.

7 THE COURT: Let's continue with the -- or start
8 with cross examination.

9 So actually, this witness can be called by either
10 side, like all witnesses, right. He was called by the
11 plaintiff and this is the plaintiff. Now we have
12 cross-examination by defense counsel. Go ahead,
13 Mr. DiLorenzo.

14 MR. DiLORENZO: Thank you, your Honor.

15 STEVEN B. BARGER,
16 called as a witness herein by the Plaintiff, having been
17 previously duly sworn and having testified, was examined and
18 testified further as follows:

19 CROSS-EXAMINATION

20 BY MR. DiLORENZO:

21 Q Hello, Mr. Barger.

22 A Good morning.

23 Q As the Judge said to you yesterday, if you need a
24 break, have some time, whatever you need, just tell me and
25 I'll stop.

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1 A Everything will be okay.

2 Q At the end of your testimony yesterday you talked, I
3 think it was at the end, you talked about the Lebenthal
4 proposal. Do you remember that testimony?

5 A Yes, sir.

6 Q And the Lebenthal situation was not an actual contract,
7 correct, it was just a proposal to charge 20,000 a month and
8 a \$50,000 fee for intellectual property?

9 A It was one being presented to the board. I was told it
10 was a formality. We were just getting started.

11 Q You heard Mr. Plumeri said it never made it to the
12 board. Did you hear him say that?

13 A It's possible. I don't know that. All I know is I
14 gave it and was told that it was going to be presented to
15 the board. It was just a formality, that's all I know.

16 Q At the time, Mr. Plumeri was actually on the board,
17 correct?

18 A He was.

19 Q And in fact, in your research for the Lebenthal
20 proposal you found he was on the board, that's when you
21 reached out to him, correct?

22 A I don't remember if he reached out to me or I reached
23 out to him. I know that --

24 THE COURT: He's on the board. We know that. You
25 don't have to answer.

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1 Q You hadn't connected with him for some 13 years at that
2 point?

3 A I tried, I tried e-mail -- I mean text. But I did not
4 have his e-mail address so, no, we didn't talk.

5 Q I believe you indicated earlier that when he set the
6 price that he would pay you at First Data he asked you what
7 you were making, you said I'm making 20 to 25,000 a month?

8 A I believe that's right.

9 Q And you submitted -- do you recall submitting an
10 invoice -- there were dates when that invoice, when the
11 purchase order would take effect I believe March 17, the
12 first date?

13 A I don't remember dates or I do not remember dates. I'm
14 sorry.

15 Q Do you remember submitting a \$30,000 proposal for
16 February when you went down to Atlanta to check the company
17 out?

18 A I know there were a series of them. I can't testify to
19 dates. I'm sorry.

20 Q That's okay. Do you remember submitting an invoice
21 that you talked about at your deposition that was for your
22 expiration to see if you wanted to undertake the assignment?

23 A I'm sorry, I don't know what that means "expiration."

24 Q Expiration, investigation, you were going to take a
25 look. You said you went down to the company before the time

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1 period started, spent a week or so in Atlanta. You don't
2 remember that testimony?

3 A Those were not the circumstances, no.

4 Q What were the circumstances of the first invoice?

5 A All the 30 years, every time Joe engaged me there was
6 verbal contracts as to what was going to be needed to make
7 it happen economically. And whatever that was, after 30
8 years he trusted me in the nth degree. He just said,
9 whatever it's going to take we'll approve. And that was, it
10 was always that way for 30 years.

11 Q In this particular case, though, there was a written
12 agreement, wasn't there?

13 A A written consulting agreement, is that what you're
14 asking me?

15 Q Yes.

16 A Yes.

17 Q That was different than all the 30 years previous worth
18 of arrangements?

19 A Usually in the other 30 years of all the places that we
20 fixed, it was short time of just come in and do it, we'll
21 pay you, no contract. Then he would just bring me on
22 full-time. He wanted me to get a sense of the company
23 before I said yes.

24 Q You mentioned in your testimony yesterday that the
25 Lebenthal proposal had a specific provision that provided

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1 for \$50,000 for intellectual property?

2 A It was for that and for offsetting other things that I
3 would have to refund money to existing relationships. So it
4 was a combination of things. And I believe it was 60,000 in
5 Lebenthal.

6 Q And as I understood your testimony, I thought that you
7 were using that Lebenthal proposal to show that sometimes
8 intellectual properties paid separately and sometimes it's
9 included in your agreement, as your son testified.
10 Sometimes it's in and sometimes it's not included in the
11 fee. And Lebenthal was an example of it not being included;
12 is that correct, not included in the monthly fee?

13 A It was going to be a payment, yes.

14 Q Was that to show that you could have mixed up these two
15 contracts and thought there was a special payment provision
16 for the intellectual property at the end of the contract and
17 that's why the final invoice was the 50,000 for intellectual
18 property?

19 A Once again, Joe and I our conversation was trying to in
20 someway match up what the Lebenthal offer was. He would
21 make certain that I was coming aboard at the end. Joe has
22 always been fair with me, always. We've been friends for 30
23 years. So when he -- my relationship with Joe is probably
24 different than anybody else that he's been associated with
25 in the company. He trusted my judgment. And he said

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1 whatever it's going to take, figure it out, invoice it,
2 let's go and get this started. We did that forever.

3 Q So the Lebenthal, you're saying the Lebenthal proposal
4 was to say that he was going to match the Lebenthal
5 proposal?

6 A Joe knew what it was. And we all -- there was nothing
7 that formal with Joe. It was never that way.

8 When he recruited me he knew that I could be somebody
9 that he could trust with all of his private information,
10 everything that was going on at the company. And he knew
11 that whenever I made some type of proposal, it was going to
12 be justified all the time. It was never ever any question
13 through our 30 years.

14 Q You at the time that final invoice was submitted for
15 the 50,000, you had decided to become an employee. And you
16 knew, as your son testified, that you were going to breakup
17 the consulting arrangement with your son?

18 A We were throwing everything up, it was part of the
19 entire process. That's just Joe and me. There is no -- it
20 was never formal, it just wasn't. We shook hands. We loved
21 each other. We protected each other's back. I saved him.

22 THE COURT: I think he explained himself. I don't
23 know that this case is about Lebenthal. I think the case is
24 about the ADA and about the FMLA.

25 MR. DiLORENZO: Your Honor, we also --

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1 THE COURT: I'll let you have the opportunity to
2 question him. He answered it. We heard enough about
3 Lebenthal. Go on to something else.

4 MR. DiLORENZO: Okay, your Honor.

5 BY MR. DiLORENZO:

6 Q Let's talk about the position that you had when you
7 were hired after the agreement was signed. You were hired
8 for the sales transformation, the culture change, that you
9 said would take about seven years, is that what you were
10 hired for?

11 A Yes. Once again --

12 THE COURT: You answered yes.

13 THE WITNESS: Yes.

14 THE COURT: I know you're attempting to explain
15 everything, I'm not going to allow that to happen. Let's
16 move on what to what is essential here. Yes or no answer.
17 If you need an explanation, your lawyer can ask you a follow
18 up question. I'm really trying to get to the essence of
19 things.

20 THE WITNESS: Thank you. You're good.

21 BY MR. DiLORENZO:

22 Q You didn't have the sales training group yet,
23 Mr. Fricke was still there when you got hired?

24 A Yes.

25 Q What was it that you were hired to do with Joe Plumeri

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1 initially?

2 A When Joe and I would start with any company, one of the
3 first things he would do is he wanted me to do because
4 enormous responsibilities was he wanted me to go across the
5 entire company because he knew what our message was. And he
6 wanted me to introduce myself and meet with all of the
7 senior executives all of the department heads, globally,
8 everywhere. Get a sense of how they were operating. Get a
9 sense of their challenges from day to day. And just to
10 start to have a conversation about down streaming the
11 message that Joe wanted everybody to understand.

12 And that is based on the concept that price becomes an
13 issue in the absence of value. So our charge was to make
14 certain that everyone, at every level in the company, senior
15 management, understood it, could in essence restate it so
16 it's accurate. So they owned the words and passed it on
17 down through their management, so that department owned the
18 concepts.

19 So I was on my way of traveling the world to meet
20 everybody.

21 Q That was about 750 people, is that what you said?

22 A No, I didn't say 750.

23 Q I read, I think in your deposition, that you and
24 Mr. Plumeri were going to around these shows and talk --

25 A That was with --

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1 Q The top 750 people were the First Data Way?

2 A That was when --

3 Q How long did it take you to accomplish?

4 A I just got started and I was given -- I did Omaha, some
5 people in New York, some people in Atlanta. And I was
6 spending a week different places. And then all of a sudden
7 when Fricke left I took on other responsibilities and that
8 kind of slowed down.

9 Q What percentage of your job would you say was managing
10 the sales training group compared to this other
11 responsibility?

12 A I would say probably 70/30.

13 Q Seventy the training group, 30 being?

14 A Yes, being that way. I couldn't make 100 percent the
15 original job.

16 Q Did you have the sales training group before
17 Mr. Plumeri left this area and didn't supervise you any
18 longer?

19 A Yes.

20 Q It was 70/30 both while he was there as well as after
21 he left?

22 A There was still this corporate messaging that I was
23 involved in with Tony. So there were other things going on
24 besides just training, yes.

25 Q You weren't doing the road shows anymore, obviously

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1 with Plumeri. And you were not doing the shows with Tony.
2 Were you doing some shows on your own in addition to the
3 ones with Tony?

4 A We would have chairman councils or we would have some
5 type of regional meetings I would also be addressing. We
6 had a program where we had -- I can't remember the name,
7 interns I think it was -- and people who were potentially
8 new hires that I also did presentations for. There were
9 multiple things going on, as everybody has testified, I gave
10 a lot of speeches.

11 Q You spoke at -- Tony's program was the First Data Way,
12 right?

13 A I helped Tony put it together.

14 Q He said he put to together. Did you do a lot of the
15 work on it?

16 A We all sat and decided what was going to happen. And I
17 ended up introducing everybody, and kind of emceeing it, and
18 making key comments during the presentation. So relate back
19 to the concept that Tony wanted to put in place. It was all
20 his idea. It was an opportunity for us to talk to 750
21 people who were feeling disenfranchised.

22 Q You would speak for about an hour in that program?

23 A I had a presentation for about an hour, but I spoke
24 frequently during the day based on what each speaker would
25 say. I would add things and add color to everybody's

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1 presentations. Then in the evenings we had a dinner that I
2 emceed the dinner. And we had everybody who attended stand
3 up and tell us two things that they --

4 THE COURT: I don't think we need all of this. I
5 don't want to know what you ate for dinner.

6 Next question. Let's get on to something
7 relevant.

8 MR. DiLORENZO: The relevancy here relates to
9 their claims concerning whether replacements, who was doing
10 the work --

11 THE COURT: You asked enough questions. I gave
12 you latitude. Let's move on.

13 BY MR. DiLORENZO:

14 Q Would you take a look at Defendant's exhibit 307, is
15 this one of the agendas?

16 A Yes.

17 Q You're speaking at Enterprise Solutions Selling, is
18 that typically what you spoke at?

19 A Among other things, yes.

20 Q The introduction is by Tony Marino, is that the
21 emceeing that you were talking about that you did?

22 A No.

23 Q You don't show up here as doing anything in the
24 beginning.

25 A It was just part of the flow of the 20 meetings. We

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1 were a team doing this.

2 THE COURT: You don't have to answer that.

3 Q You talked about the theme that you were trying to
4 develop and teach everybody was price becomes an issue in
5 the absence of value, can you tell me what that means?

6 A Well, we always thought it was self-explanatory. But,
7 no matter in of our lives, whatever we are spending our time
8 or spending or money, whatever we're spending, must equate
9 to the value we receive. So the only time that value is
10 ever questioned in any, in a relationship, in service, in
11 sales, in product, is when the price exceeds the value.

12 Q Now you heard testimony the last couple of days that
13 the time that you were put on the reduction of force you
14 were the 54th highest paid employee out of 23 or 24,000
15 employees, do you remember that testimony?

16 A I do.

17 Q That would be your price to the corporation, right?
18 That's the price of what we're paying for your services,
19 right, your salary compensation?

20 A That was the agreed-upon price.

21 Q And early on after Mr. Plumeri left, he left in 2015,
22 right?

23 A I don't remember date. He did leave.

24 Q You had a conversation with Mr. Charron. At that time
25 Mr. Plumeri was gone, when Mr. Charron had this conversation

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1 with you?

2 A Time-wise I don't know.

3 Q Weren't you working for Mr. Hack at the time. And
4 Mr. Hack reported to Mr. Charron, and that's why Mr. Charron
5 was talking to you?

6 THE COURT: Whatever it was, you talked to people.

7 Listen, you were there for a number of years. Counsel is
8 trying to pick and choose a couple of conferences you had, a
9 couple of discussions you had. You answered the question.

10 Move on.

11 BY MR. DiLORENZO:

12 Q You were only there about two-and-a-half years, right?

13 A Yes.

14 Q You agree with me, Mr. Charron talked to you based on
15 how high your salary was, you would have to do more things
16 of value to the company to justify that salary?

17 THE COURT: Do you remember that?

18 THE WITNESS: Yes.

19 Q That was long before you were diagnosed with cancer,
20 correct?

21 A I don't think it was long before, no, maybe a couple of
22 months.

23 THE COURT: It was before. You were working
24 there, you had this conversation, and then maybe you could
25 do more for the company. Is that basically the essence of

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1 what it was?

2 THE WITNESS: Yes.

3 BY MR. DiLORENZO:

4 Q Isn't it that situation exactly the one we're talking
5 about when we said price becomes an issue when there is no
6 value or not the same value that somebody --

7 THE COURT: Save that for summation. Next
8 question.

9 BY MR. DiLORENZO:

10 Q You described the way you felt after that conversation
11 as getting pressured because you weren't meeting the
12 revenue, the company wasn't meeting its revenue
13 expectations, and you were a fixed expense. Do you remember
14 that testimony?

15 A I don't.

16 Q You would agree with me that the training function that
17 you were heading was an overhead to the corporation?

18 A Everybody's salary is an overhead.

19 Q But this was --

20 THE COURT: Don't argue. Next question.

21 BY MR. DiLORENZO:

22 Q Are you saying that it wouldn't have been considered a
23 fixed expense?

24 THE COURT: Sustained. Next question.

25 BY MR. DiLORENZO:

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1 Q Did you believe that Mr. Charron and the corporation
2 had a different view of the value that you rendered to the
3 company versus what you thought the value was worth?

4 THE COURT: Did you have any discussions with
5 Mr. Charron about whether you were doing the right job,
6 whether you were value to the company?

7 THE WITNESS: No. Our discussions were taking on
8 more responsibility.

9 THE COURT: He wanted you to take on more
10 responsibility.

11 THE WITNESS: Yes.

12 THE COURT: Did you agree to do that?

13 THE WITNESS: I did.

14 THE COURT: You did take on more responsibility?

15 THE WITNESS: I was researching a way to get that
16 done.

17 THE COURT: Next question.

18 You're getting a salary, they wanted to get more
19 bang for the buck, that's basically what happened.

20 THE WITNESS: Yes.

21 THE COURT: Did anyone ever complain about the job
22 you were doing or discharge you if you didn't do anything
23 better, conversations like that?

24 THE WITNESS: Never.

25 THE COURT: They wanted to get more productivity

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1 out of you for the money you were making.

2 THE WITNESS: Yes.

3 THE COURT: Is that the essence of your testimony?

4 THE WITNESS: Yes.

5 THE COURT: You agree with that?

6 THE WITNESS: Yes.

7 THE COURT: After that, you tried to do something
8 different; yes or no, I don't know.

9 THE WITNESS: Yes.

10 THE COURT: What did you do after that
11 conversation?

12 THE WITNESS: I began having conversations with
13 the other training departments in the company to see if we
14 could bring them on board underneath.

15 THE COURT: So you took the advice seriously. You
16 tried to do something about it.

17 THE WITNESS: Yes, sir.

18 BY MR. DiLORENZO:

19 Q As a result of that conversation, did you have an
20 understanding that the company did not appreciate the value
21 that you rendered to the company?

22 A No.

23 THE COURT: Sustained. He testified. He
24 explained himself.

25 MR. DiLORENZO: Your Honor, he gave

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1 inconsistent --

2 THE COURT: You can argue at your summations.

3 MR. DiLORENZO: I understand that, your Honor.

4 THE COURT: A fact adduced in evidence.

5 MR. DiLORENZO: Your Honor, at his deposition he
6 gave contrary --

7 THE COURT: Do you have his deposition?

8 MR. DiLORENZO: That's what I want to do.

9 THE COURT: Go ahead.

10 BY MR. DiLORENZO:

11 Q Page 124 of your deposition. Do you recall being asked
12 this question and giving this answer, page 24 line 21.

13 Question: And going back to what you said that you
14 expected that would continue in the role that you were
15 doing, and sales training would go to somebody else when
16 they found your successor for it. Isn't it true that Dan
17 Charron came and talked to you in 2015 and said, 'Steve, if
18 you're going to make \$408,000 a year you've got to do other
19 stuff around here.'

20 And you gave this.

21 Answer: Yeah, he did. We had the conversation,
22 absolutely did. And that point, at that point, I told him I
23 would start just go about --

24 Question: What is the date again that he said that, in
25 the fall 2015?

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1 Answer: Yes, I think that's about right. I don't
2 remember the date exactly. Dan said we've got to, and
3 that's reflection of a couple of things. That's a
4 reflection of Dan not understanding the value that I did
5 bring, that's one challenge.

6 So that was your understanding?

7 THE COURT: You read the deposition, it's fine.
8 And can you consider that, folks, for impeachment purposes
9 or if you think it's inconsistent of whatever he said or
10 substantive evidence.

11 Go ahead.

12 BY MR. DiLORENZO:

13 Q Mr. Barger, yesterday you talked to us a little about
14 the 360 review that you had done?

15 A Yes.

16 Q And that's not just subordinates, that's people all
17 around you, 360 degrees, right, including your manager?

18 A Yes -- I think there was a lady named Stasha.

19 THE COURT: You don't have to answer that
20 question. He's making statement. You don't have to answer.

21 THE WITNESS: I'm sorry.

22 THE COURT: Listen to me, we're not going to stay
23 here all day with this. If you makes a statement you don't
24 have to comment. Next question.

25 BY MR. DiLORENZO:

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1 Q I'd like to show you a page from that review. There is
2 comments, right, people submit comments?

3 A I don't know.

4 THE COURT: You have comments. What do you want
5 to show him?

6 MR. DiLORENZO: Plaintiff's Exhibit 23.

7 THE COURT: Is that in evidence?

8 MR. DiLORENZO: It was referenced yesterday. I
9 don't think the document is in evidence.

10 COURTRoom DEPUTY: What is the number?

11 MR. DiLORENZO: Plaintiff's Exhibit 23.

12 THE COURT: Let me find it.

13 COURTRoom DEPUTY: In evidence.

14 THE COURT: In evidence.

15 MR. DiLORENZO: Okay.

16 THE COURT: This is the performance review.

17 (Plaintiff Exhibit 23 received in evidence.)

18 BY MR. DiLORENZO:

19 Q You see this box on the right-hand side, these are the
20 people that submitted comments, right?

21 A It looks like they are, yes.

22 Q So manager one is Jeff Hack, that's who you reported to
23 at the time?

24 A Yes.

25 Q And the first direct report is Justin Stamey?

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1 A Yes.

2 Q And Julie Kelly is on here?

3 A Yes.

4 Q Third direct report. You see that?

5 A I see all those. I know all those people.

6 Q Here are the comments on the back page I've highlighted
7 them. Can you see some comments, the first highlighted
8 comments: Steve's fatal flaws as manager of people he
9 doesn't hold his team to the same standards. He also fails
10 to coach his people when things weren't going well, and
11 instead makes is a change to fix it. This tends to divide
12 the team. While Steve is a great leader he struggles to be
13 a day to day manager, because he's often involved in
14 projects that have little impact on the sales transformation
15 and overall strategy, for example, attending every FD Way
16 training.

17 That's First Data Way training that you did with Tony?

18 Is that a yes?

19 A Yes, sir.

20 Q Next one is: Perhaps not to be considered a fatal flaw
21 or weakness is lack of documentation of underperforming team
22 members. Steve doesn't handle conflict well. Sometimes he
23 doesn't communicate, sometimes he makes decisions or doesn't
24 include his reps in the process. Steve makes moves, even
25 demotions and scope, while talking about a great job the

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1 person isn't doing which isn't true.

2 THE COURT: What question do you want to ask him?

3 Do you want to read the deposition? Ask him a question.

4 BY MR. DiLORENZO:

5 Q Were these legitimate criticisms in these comments?

6 THE COURT: Yes or no.

7 A They came from somebody.

8 Q So they were legitimate or not legitimate?

9 A I don't know what legitimate means.

10 THE COURT: They were comments that were made.

11 THE WITNESS: Yes.

12 THE COURT: Do you agree with them, disagree, or
13 whatever?

14 THE WITNESS: I don't know that I agree with all
15 of them. I think some of them are probably accurate.

16 THE COURT: You took them constructively as
17 possible?

18 THE WITNESS: That's why I did it, so I can
19 improve.

20 BY MR. DiLORENZO:

21 Q Yesterday when you described the review you said they
22 rated you better than you would have yourself, those are
23 some of the criticisms you would have given yourself.

24 A Yes, and there are a lot more that I would have given
25 myself.

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1 Q A number of those relate to the managing of the day to
2 day of the sales training group, right?

3 A I assume they do, yes.

4 Q Did you have much management experience before you got
5 this sales training group?

6 A Most of my life. I've had at Barney, Shearson. I had
7 training departments reporting to me.

8 Q This large?

9 A Larger.

10 Q Did you get laid off from any of those jobs?

11 A I've never been.

12 Q You testified at your deposition you were very familiar
13 with the process of reductions and force on Wall Street, a
14 short-term cost-saving, do you remember that testimony?

15 A Yes.

16 Q You disagreed with the philosophy of it; is that right?

17 A No. But what I disagree is the premise by which it's
18 presented to the public. It is usually done so that
19 quarterly reports look good to the analysts. I've seen that
20 happen through all of the companies I've worked for. And
21 I've watched the masters of what I call financial
22 engineering make quarterly reports look really good.

23 Q You heard Mr. Bisignano's testimony yesterday. Did you
24 agree with the way he described the financial difficulties
25 that he faced when he came into the company?

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1 A They had a terrible debt load.

2 Q You mentioned the transformation of the culture that
3 you worked on at another location when you talked about your
4 damages. You said that you estimated seven years' worth of
5 future employment because it has taken in the past that long
6 to change a culture?

7 A Right.

8 Q What was the name of the other company where it took
9 seven years?

10 A Shearson and Smith Barney is one example.

11 Q That took seven years?

12 A The final result of it took hold seven years after I
13 started it.

14 Q There is no way to tell how long that's going to take
15 in a company, every company is different?

16 A It is different, yes, sir. Simple answer is it's
17 different.

18 Q Frankly to turnaround First Data didn't take seven
19 years even after you left?

20 A Well, the turnaround has to do with its financial
21 reporting, not its behavior.

22 Q So you have no idea whether its behavior turned around.
23 By the time this financial transformation had turned around
24 you were gone, right?

25 A I was gone, yes.

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1 Q Do you have any information that supports your belief
2 that you would have worked seven years changing that
3 culture? Do you have any proof that it would have taken
4 seven years at First Data?

5 A Just my past experience is all.

6 Q That was with one other company?

7 A Multiple companies. I did the same thing, consulting,
8 with UBS. It took them about five years to make the
9 transition. I was consulting for them.

10 Q For UPS?

11 A UBS, I was in the financial world. When I stopped
12 consulting people continued the process that I put in place.
13 And the people that I trained became the leaders of those
14 companies. And they took all of the concepts and drove them
15 forward.

16 Q When Robin Ordung became the interim vice president of
17 the sales group when you went out on leave, she assumed the
18 entire job, didn't she, that you had?

19 A That's what I heard today, this week.

20 Q What was going on? What was part of the job besides
21 managing the sales training force at that time?

22 A Sales training was a portion of where we would want to
23 train our sales people who were being hired to come in and
24 sell the bell and tear product that we had. It was the
25 inside made to sell clover, to sell the fact that we could

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1 ask a series of questions and get people to understand more
2 about what we do.

3 But we also, there was a fairly small part, we also did
4 was we had bank partners and we had other delivery systems
5 other than our direct sales force. And we had servicing
6 people and call centers.

7 The goal was to get and keep. When I got there the
8 getting was happening; the keeping was terrible. They were
9 flying out the back door. So we needed to get the culture
10 in place to understand how to keep them, that's one of the
11 reasons they weren't making any money. So it cut across the
12 large swath.

13 And on top of that, our charge was to answer the bell
14 any time that a business unit wanted our help. So on a
15 weekly basis we had a status report of a spreadsheet with
16 300 different ongoing projects to service all of the company
17 that requested help.

18 Q So the agenda, the projects, as well as the staffing of
19 your group was being driven by the other units because they
20 make requests and you would have to be able to respond to
21 those and fit the needs, whether to hire a number of people,
22 or develop a new program, or whatever you had to do?

23 A That's not exactly true. Would you like me to explain
24 it to you?

25 Q Sure.

1 A When a business unit would request help, either one of
2 their partners in bank training we were about to lose a
3 relationship with a bank, we would send people on site
4 immediately. The more banks that were requesting, we didn't
5 have enough people to do it.

6 So the process would be, we would open a req, a
7 requirement for a position. We would get the req approved
8 by senior management. And we would be cued up in a line of
9 priorities. And once we were the next priority we would go
10 out and try to hire somebody to fill it. All of the hiring
11 requests were controlled by senior management. All I did
12 was put the request in for the business unit.

13 Q When Robin, so are you saying -- I'm not sure I got an
14 answer to the real question, which is the sales
15 transformation versus the training. The time you went on
16 leave was all the sales transformation work in your job
17 being done through the sales training organization, one
18 director or another, or one division or another, it was all
19 coming through that?

20 A I've got to clarify if you're asking did all my direct
21 reports cross the entire spectrum?

22 Q No. I heard a lot of testimony about you had a sales
23 transformation piece of your responsibility and managing the
24 sales training group, which came later. I haven't been able
25 to understand after Mr. Plumeri left what it was that you

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1 were doing on sales transformation with the culture, the
2 seven years the things were going to take, unless it's doing
3 that transformation through the people in the sales training
4 organization?

5 THE COURT: Do you understand the question? Let's
6 get a quick answer and move on to something else.

7 A Yes.

8 THE COURT: The answer is yes.

9 Q It is yes, all done through the people that work for
10 you?

11 MR. ZEITLIN: Asked and answered.

12 A No. We had sales responsibilities and but those
13 included service and other things besides sales.

14 Q I understand that.

15 A That's one group. I still was, as everybody has
16 testified, the spokesperson for the messaging of how we're
17 going to make this work. And that was embedded inside of
18 the sales and all the other training that I was doing.

19 Q Okay. So really it was integrated with the sales
20 training organization, right?

21 A Yes, sir.

22 Q You were the sole contributor on giving the speeches
23 once in a while going to the First Data Way?

24 A There were several people who worked for me who got
25 developed over the course of several months who, I would

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1 say, I would be really proud of could give the same
2 presentation --

3 Q And you heard testimony --

4 A -- including Tony.

5 Q -- you heard testimony that Justin, I believe it's
6 Stamey, took over the group after you left?

7 A I heard him, yes.

8 Q He was a director under you?

9 A Yes.

10 Q Did it surprise you, even hearing Ms. Kelly's testimony
11 yesterday, that that group went down to 20 people or 25
12 people or so from 50, 60, 70 whatever it was?

13 A Yes. The group was disbanded, it didn't necessarily
14 reduce in size. It was passed back to different business
15 units. That's part of the financial engineering that goes
16 on.

17 Q But there were, she testified there were 20 to 25
18 people who lost those jobs. Those people didn't get passed
19 on to different business units?

20 A No.

21 Q So there --

22 A There is a large group that went back to others, to the
23 banking side. They were transferred out. So it's a
24 combination of the two.

25 THE COURT: Let me try to get clarification. I

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1 may be wrong, and the jury is not going to draw any
2 inferences from my questions, I warned them. I want to try
3 to get focused what I think may be the more significant
4 issues. I may be right, I may be wrong. Let's cut to the
5 chase.

6 There was a reduction in force, all right. Do you
7 think that you were erroneously included in that group of
8 300 or do you think it was okay to be included with the
9 others?

10 THE WITNESS: No.

11 THE COURT: No what?

12 THE WITNESS: I think --

13 THE COURT: You should not have been included,
14 your salary should have stayed the same, you should not have
15 been one of the 300.

16 THE WITNESS: That's what the law says. That's
17 what I was told the law says.

18 THE COURT: I didn't hear you. Do you agree or
19 disagree they had the right to reduce the forces?

20 THE WITNESS: They always do.

21 THE COURT: Always do that, right?

22 THE WITNESS: Yes.

23 THE COURT: You know that.

24 THE WITNESS: Yes, sir.

25 THE COURT: Your number came up here, and you're

1 taking issue with that, right. Why do you think that you
2 should not have been on that list? And why you should have
3 been kept on as a high-end employee for collectively
4 750,000? Explain to the jury and let's move on.

5 THE WITNESS: Okay. I was being dismissed. All
6 of the things that have happened basically happened after I
7 said I was returning to work. And everything that took
8 place where I did follow all of the rules the way, I
9 understand or FMLA and other laws, is a requirement for me
10 to be brought back from a disability. And that I could
11 either have the same job or a similar job.

12 THE COURT: So you believe that if you never had a
13 disability and you stayed in that position, that the company
14 could not reduce your salary or include you in part of the
15 restructure of the organization. Is that your position? If
16 you never had disability and the company did the same thing,
17 you would say they were acting improperly?

18 THE WITNESS: I don't know.

19 THE COURT: I want to know. If you didn't have
20 disability, you stayed on, is it your position that your
21 position was frozen at 750,000 and you could not be part of
22 the group of 300? I want to understand what your position
23 is?

24 THE WITNESS: I think that I would have continued
25 to find more responsibilities, as Dan asked me to do.

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1 THE COURT: It's your position that you should not
2 have been part of -- regardless of you taking disability or
3 not, you explain why. You want to tell the jury again why
4 you should not have been part of the part of the 300, with
5 or without disability.

6 THE WITNESS: My conversations before I went out
7 on leave or with Mr. Charron, we had discussions about where
8 some of the servicing training should take place. Because
9 he was well aware that the servicing side was
10 non-functional. And when he asked me to start looking at
11 fixing that, I took that as a wonderful decision, because
12 we're talking about getting and keeping. The keeping was
13 killing us. He saw that, he wanted that to be fixed. He's
14 the only man that saw it. And I wanted to say, yeah, let's
15 go get it.

16 THE COURT: So then it doesn't matter whether you
17 were disabled or not, you should not have had your position
18 reduced, you should not have been one of the 300. That's
19 your position.

20 THE WITNESS: No.

21 THE COURT: And you explained why. Let's get
22 going.

23 BY MR. DiLORENZO:

24 Q You never testified at your deposition Mr. Charron
25 asked you to look at that and take it over. He told you you

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1 better find something to do, right?

2 A No.

3 Q Is it he told you that he wanted --

4 THE COURT: Wait a second. Who is testifying now?

5 He said no. Do you have something there you want to read?

6 You can read it. I think the jury understands this case.

7 BY MR. DiLORENZO:

8 Q You testified at your deposition you don't believe you
9 got fired because you took leave. Do you remember that
10 testimony?

11 A If you say it's in there.

12 THE COURT: Don't question his memory. Is there a
13 question you want to read something?

14 Did you believe you were terminated because you
15 took disability? Yes or no. Counsel said that you said no
16 at your deposition. Is that true or not?

17 THE WITNESS: I --

18 THE COURT: So read from the deposition.

19 THE WITNESS: I don't know when I first noticed --
20 it was the first deposition I've ever taken in my life.
21 There is a lot of stuff that I do not remember.

22 THE COURT: Stop, stop. If you have something,
23 I'll let you read it.

24 MR. DiLORENZO: Thank you, your Honor.

25 Q Page 159 and 160.

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1 Question: Let me make sure I get my questions right.
2 My question to you is, has anyone ever told that you were in
3 included in the reduction in force where you were terminated
4 in January of 2017 because you had taken FMLA leave? Has
5 anyone ever told you that?

6 A No.

7 Q There was an objection.

8 Answer: No, I never had conversation with anyone. How
9 could they?

10 Question: That's right. Has anybody ever told you you
11 were included in the reduction in force and terminated in
12 2007 because you had cancer?

13 Objection.

14 Answer: Nobody ever talked to me.

15 Question: Okay. Do you believe that you were
16 terminated because you had cancer?

17 Answer: All I know is I did not get to come back to
18 work, that's all I know.

19 Question: I agree that you didn't come back to work.
20 I'm asking what you believe. This is your case as a
21 plaintiff. And I wanted to, if you stand up in front of a
22 jury are you going to say I believe I was terminated because
23 I have cancer, because I have cancer?

24 Answer: Not necessarily because I have cancer.

25 Question: I'm asking you, you did --

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1 Answer: I don't think it's because I had cancer.

2 Question: Okay. Do you believe -- do you think it was
3 because you went out on leave that you were included?

4 Answer: Say that again?

5 Question: Okay. You just said that you don't believe
6 it was because you had cancer is the reason why you were
7 terminated. Do you believe you were terminated because you
8 had taken leave?

9 Answer: No, because the leave was requested by Tony.
10 I didn't want to go on leave.

11 THE COURT: That's what you said in your
12 deposition. Do you want to change any of that now? You did
13 say that or not?

14 THE WITNESS: No. The only thing I will tell you
15 is while I was being deposed I felt there were lots of
16 disjointed questions that were confusing. That's the first
17 time I had ever been deposed my your life.

18 THE COURT: You can tell us now, do you disagree
19 with that, I'll give you a chance to do that.

20 THE WITNESS: What you read is fine.

21 BY MR. DiLORENZO:

22 Q You said when you were describing the law to the judge,
23 which was a little unusual, you were explaining you should
24 get an equivalent position if you don't get your position
25 back. You're not claiming that you should have gotten Robin

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1 Ording job, she was an HR person?

2 A I have no idea what that means in the law.

3 Q Are there any positions that you were entitled to that
4 you should have been offered?

5 A I have no idea.

6 Q Do you know whether the 362 people, any of them were
7 offered positions?

8 A I have no idea.

9 Q What about this EJ Jackson, you heard testimony about
10 his job from I think Mr. Charron?

11 A Software guy.

12 Q Yes. You don't believe you were qualified for that
13 position, do you?

14 A No.

15 THE COURT: You were not qualified.

16 THE WITNESS: No, he's a software expert.

17 THE COURT: You're not a software guy.

18 THE WITNESS: No.

19 BY MR. DiLORENZO:

20 Q You said earlier, maybe my question or the Judge's
21 question, that the reason you think things were done wrong
22 here is because you weren't selected for layoff until after
23 you tried to come back to work. Were you here yesterday for
24 the three lists we showed that were compiled with your name
25 on it a large part of your department \$2.2 million in

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1 savings including your salary --

2 THE COURT: Mr. DiLorenzo, save it for argument.

3 MR. DiLORENZO: Sorry, your Honor.

4 THE COURT: We want to get the facts out. The
5 facts. Whatever happened yesterday they are facts, you can
6 recall them to the jury, you can look at many documents we
7 have, you can look at it from the summation and argue from
8 the facts.

9 BY MR. DiLORENZO:

10 Q Were you here for the testimony?

11 THE COURT: He was here all the time.

12 BY MR. DiLORENZO:

13 Q Did you hear the testimony?

14 THE COURT: He heard the testimony. Next
15 question. Nothing wrong with his ears.

16 BY MR. DiLORENZO:

17 Q Do you allege that any of those lists were developed in
18 bad faith or improperly by the people that testified
19 concerning them?

20 A That's up to my attorneys, I have no idea.

21 Q You don't have any information that indicates they
22 aren't legitimate lists or legitimate communications?

23 THE COURT: They are the lists.

24 A They are the lists. I couldn't prove if they are right
25 or wrong.

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1 THE COURT: If they are correct or not you're not
2 dealing with that. They are the list.

3 BY MR. DiLORENZO:

4 Q There has been some testimony -- can you describe for
5 us the work that you were doing from September 4 or 6 when
6 you had the operation, until the doctor gave you the return
7 to work on January 10. You said that you were -- people
8 have said you did some work from hospital beds?

9 A I can't -- so I always wanted to know what the team was
10 doing. So as I mentioned before, we had a weekly team
11 meeting. We had a status report of everybody's
12 responsibility throughout the entire team worldwide, three
13 different projects at any point in time. That was sent to
14 me or I got it electronically. And I just wanted to make
15 certain we were staying focused and that we were going
16 ahead. And making sure certain things were getting done.

17 And then I wanted to know, I gave them permission to
18 have their staff meetings and I would listen in. In the
19 early days before I could talk and I would text things back
20 and forth with any questions I wanted to ask.

21 That process in my opinion really helped me heal
22 faster, because I thought I was being a contributing human
23 being and not a drag on society. So that was a big deal for
24 me. I got constant e-mails back and forth, not just from my
25 team but from senior management telling me things, asking me

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1 questions, wanting to know if I want to do certain things.

2 | And I would e-mail them back.

3 There is just a bunch of stuff going on at that time.

4 And when the doctor in Atlanta thought I had pneumonia, I
5 was healed in about six days, which is normal for me. Every
6 one of my doctors said I heal rapidly. They are surprised.

7 So I wanted to continue to have the conversation, see
8 where they were, and make certain that the projects were
9 being completed. And I spent as much, as much time as
10 possible doing that on a daily basis.

Because I have a reading disability it takes me quite a while to read through several papers. I would spend my off time reading documents, et cetera, that they send me wanting to make certain that everything was going the right direction. And trusting my direct reports to take care of the responsibilities.

(Continued on next page.)

1 BY MR. DiLORENZO:

2 Q Roughly, how many hours a day do you think you worked
3 during that period?

4 A On and off, probably -- I'd wake up in the middle of the
5 night. Ten hours.

6 Q Ten hours a day?

7 A Oh, yeah.

8 Q September, October, November?

9 A I started two days after my operation. Remember, I had
10 paperwork I was looking at. When you have 300 different
11 projects going on, and the only way you are finding out about
12 it is to read about it, you've got to go through that and take
13 serious notes to get back to people.

14 Q Now, you were text messaging --

15 THE WITNESS: Your Honor --

16 THE COURT: You need some time? Take some time. If
17 you want to take a break, let me know.

18 THE WITNESS: Don't worry about this. This is
19 normal. It is no big deal.

20 A Okay. Yes, sir.

21 Q So during this time -- just a second.

22 During this time, you engaged in a number of text
23 messages with Mr. Plumeri; do you remember that?

24 A I'm sure I was.

25 Q And discussing a number of things. You weren't working

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1 for him at the time, but the two of you --

2 A At the end, he was gone then.

3 Q Right.

4 A Actually, he was vice chairman, and then he was still
5 with the firm, so.

6 Q Defense Exhibit 310. Page 16. I believe the neutral
7 boxes are your text messages, and the ones that are shaded in
8 a bit are Mr. Plumeri's. On October 26 --

9 A I see it.

10 Q -- 3:36 in the afternoon, there's one from you to him.
11 And you say: I'm not going to work full-time yet, but can do
12 three to four hours. Staying at home is --

13 THE COURTROOM DEPUTY: Mr. DiLorenzo --

14 Q -- killing me?

15 THE COURTROOM DEPUTY: -- it is not in evidence.

16 310 isn't in evidence.

17 MR. DiLORENZO: I'm sorry.

18 THE COURT: Which one is this now?

19 MR. DiLORENZO: I offer 310 into evidence, which are
20 the -- sorry, which are the Plumeri text messages.

21 THE COURT: Defense Exhibit 310.

22 MR. DiLORENZO: I don't think there's any objection.

23 THE COURT: One second. Which one?

24 THE COURTROOM DEPUTY: 310. Defense Exhibit 310.

25 THE COURT: I think that's already in evidence.

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1 MR. DiLORENZO: I think 311 you --

2 THE COURT: Put it in evidence now, no objection.

3 (Defense Exhibit 310 received in evidence.)

4 MR. DiLORENZO: Sorry, Your Honor.

5 Q So you see, August --

6 A I do.

7 Q -- October 26 --

8 A Yes, sir.

9 Q -- the e-mail from you to Mr. Plumeri, who's not your
10 boss, and you say: I am not going to work full-time yet, but
11 can go three to four hours. Staying at home is killing me.

12 Do you see that?

13 A I do.

14 Q And the next message you sent him on the same day, about
15 three minutes later, is: Also, I need the income to continue.

16 Do you see that?

17 A Right. Yes.

18 Q And that was your full income, right? That was --

19 A I don't know what that means.

20 Q You don't know what it means, it says: I also need the
21 income to continue?

22 A Yeah. No, I mean, whatever the context, I don't know.

23 You mean, if that means needing money, that would be accurate.

24 Q At the time -- well, so is this an accurate description
25 of how much you are able to work at the time, instead of ten

1 hours, three to four hours?

2 A No.

3 Q You weren't thinking at the time you were sending these
4 text messages that there would be litigation in this case, did
5 you?

6 A This Joe was always concerned about me working the hours
7 that I worked. And I was trying to make certain, I said,
8 look, I am taking your advice, I am taking it easy. The same
9 thing I told Tony, I would take it easy, because they were
10 concerned about me. And the fact is, that my son testified, I
11 can't do nothing. It is impossible for me. So I work, and I
12 work, and I work. That's my sense of being. So it may be a
13 flaw, but that's me.

14 Q But the only other reason you do it is for the money,
15 right?

16 A I've got to make a living.

17 Q But this is the full pay while you're out on -- while
18 you're recovering from serious surgery, right? With
19 complications, right?

20 A Income to me means I just need money to live. That's
21 what that means. I don't know if it has a definition greater
22 than that.

23 Q So your testimony is -- I thought first you didn't know
24 what the context was, but your testimony is that you told
25 Mr. Plumeri something that wasn't true so that he wouldn't

1 worry about how much you were working?

2 MR. ZEITLIN: Objection.

3 MR. DiLORENZO: Is that a fair statement?

4 A No. I was making Joe feel better about my decisions.

5 Joe always worried about how many hours I worked. And I'm
6 just trying to soothe him, saying, okay, I'm listening to you.

7 Joe always wanted his advice that he gave me. He wanted to
8 give me advice, which he did, he was my mentor. So at the end
9 of the day, oh, yeah, I am doing some work.

10 Q And he would always -- he always worried about how hard
11 you were working, even when you were healthy and not that you
12 had -- always, all 30 years?

13 A Always.

14 Q But must have been one of the reasons he brought you
15 along was you were such a dedicated, hard worker, right?

16 A Yeah.

17 Q I mean, at the end of 30 years, if you haven't taken his
18 advice about not working hard, why would you send him this
19 text message 30 years later? He knows you are not telling him
20 the truth, right?

21 A Listen. It is just a way for when we communicate, Joe
22 and I relationship, it was not formal. It was totally
23 informal.

24 Q You'd agree with me, wouldn't you, that you had a heck of
25 a time, you went through a heck of a medical test of your

1 mental and physical abilities during those months of
2 September, October, November, December? I mean, we heard the
3 doctor testimony about the holes not healing and the
4 complications and the drainage, and so on? Wasn't difficult?

5 A Can I respond?

6 Q Yes. I thought -- it sounded difficult to me.

7 A When they first told me they were taking out my voice
8 box, it was extremely difficult. I had three days of a pity
9 party where I just wondered if I'd ever be able to talk again.
10 So it's pretty emotionally distressing.

11 I got three days sitting in the cancer ward watching
12 everybody else's problem and figured out mine was no big deal.
13 And from that time going forward, I actually felt that I was
14 blessed. I had some things I had to do. I had some fissures
15 that had to be fixed, but to say that I was distraught or
16 whatever you said about it, some people might take it as being
17 really serious. I knew I was alive, and it was a possibility
18 that I could talk again. And I got to participate in talking
19 with my -- or communicating with my staff. How could things
20 be any better. So other than those three days of a pity
21 party, I have never ever thought I was distressed, no.

22 Q And I wasn't talking just about mental, I was talking
23 about the physical.

24 A Yes. I do -- one of the things every doctor said is it
25 is remarkable how fast my body recovered. It was months and

1 months ahead of time. Including my speech therapist, who
2 cried the first time I spoke. She's never heard it before.
3 So all that fell into place. I was a blessed man. I was
4 lucky. A lot of people don't get what I got.

5 Q Do you think that going -- actually going out on
6 disability leave and not having access to the e-mail and so on
7 actually helped you recuperate faster?

8 A I'd say, I understood Mr. Marino's concern, but that was
9 in November. In December I went to the Christmas party, and I
10 could walk. I started working out. Because he saw me at the
11 very worst part of my -- I was down to 165. They hadn't put
12 the TEP yet in for me to talk. I got it put in, I went over
13 there, and I actually went to the Christmas party with my
14 staff and had conversations. That was 30 days later. So I
15 just keep thinking, I am a very, very lucky man.

16 Q Well, you said he saw you at your worst. That was
17 November 3, right? That was around November 3? But didn't
18 you get worse than that, and didn't you send him some text
19 messages after that, indicating you were even worse than that?
20 You thought you had inoperable cancer and it spread to your
21 lymph nodes, and you wanted your personal affairs put in order
22 for your wife?

23 A Yes.

24 Q You weren't that bad when he saw you with Mr. Plumeri at
25 your home on the 3rd?

1 A No, I later found out that they weren't sure about the
2 lymph nodes, but that only lasted a short period of time with
3 the doctor, and I found out I did not have recurring cancer,
4 and I was going to be fine.

5 Q So I show you Defense Exhibit 115, which I believe is in
6 evidence during Mr. Marino's testimony.

7 MR. DiLORENZO: Am I right?

8 THE COURTROOM DEPUTY: Yes.

9 Q Take a look at the message you sent at the top, which is:
10 Thanks for the wonderful visit. Personal things are the only
11 ones that count. Going in for additional repair surgery next
12 weeks. Six days in the hospital, four weeks full recovery.
13 Should be talking around Christmastime. I can play Santa. I
14 love you, Tony. Or love you, Tony.

15 A Yes.

16 Q And then the next one talks about the -- one more
17 operation, and then there's the one, on the 21st, that
18 Mr. Marino testified to. This is the one where you say: I
19 need to discuss my options with you and Joe. They need to be
20 transferred in my wife's name. Make certain they are all
21 issued. All my other accounts will be in her name, also?

22 A Yes, sir.

23 Q I need your help getting my finances together.
24 Dr. Harrison at Moffitt was very concerned about the lymph
25 node cancer being inoperable. Don't know length of time. But

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1 need your help for my family's security. Please don't
2 broadcast this.

3 A Yes.

4 Q You sent him that on the 21st, right?

5 A Yes.

6 Q So that was a darker day than November 3, right?

7 And this is three months after you've had the
8 surgery, right?

9 A It was.

10 Q And Tony -- were you pleased with the way Tony reacted to
11 these text messages that you sent, in terms of getting you
12 your bonus vested, \$174,000, all ahead of time, no reduction
13 and no stock and no waiting for cliff vesting for three years?

14 A Yes.

15 Q You had to be happy with that, right?

16 A Sure.

17 Q I mean, on a dime, he got it done in about 24 hours,
18 right?

19 A He's a good man.

20 Q He is a good man?

21 A Of course he is.

22 Q Why did you sue him in this case? What do you allege
23 that he did wrong in this case with respect to your Family
24 Medical Leave Act and ADA claims?

25 A Was not my choice. I took advice of my counsel. My

1 counsel constructed the case, and I followed what he said I
2 must do.

3 Q Is that the same with all the other individual
4 defendants, Rhonda Johnson?

5 A Yes, sir. The strategy was -- yes, sir.

6 Q The same thing with Mr. Dan Charron?

7 A Yes, sir.

8 Q Same thing with Mr. Bisignano?

9 A Yes, sir.

10 Q So when I asked you what evidence you have that indicates
11 they have violated these statutes, the Family Medical Leave --

12 MR. ZEITLIN: Objection. He's a lay witness.

13 THE COURT: Sustained.

14 MR. DiLORENZO: I am asking for facts, Your Honor,
15 that support the claim.

16 THE COURT: What is the question you are going to
17 ask?

18 MR. DiLORENZO: I'm sorry, Your Honor?

19 THE COURT: Let me hear the question.

20 Q What facts do you have that indicate they treated you
21 improperly under these two statutes?

22 THE COURT: Why do you believe that you were treated
23 improperly under these statutes? Or do you want to say you
24 don't have any belief, you leave it up to your lawyer,
25 whatever they think is okay?

1 THE WITNESS: I am not a legal expert. So --

2 THE COURT: You left it up to your lawyer?

3 THE WITNESS: Everything.

4 THE COURT: You have no way of knowing under the
5 law --

6 THE WITNESS: I do not.

7 THE COURT: -- whether they treated you properly or
8 improperly?

9 THE WITNESS: I do not.

10 THE COURT: You explained the facts here, and then
11 the lawyer advised you on the law, and you followed the --

12 THE WITNESS: Yes, sir.

13 THE COURT: -- lawyers advice?

14 That's his answer.

15 Q I want to ask you about a plaintiff's exhibit that was
16 put in evidence yesterday. I believe it was Plaintiff's
17 Exhibit 99, which is the First Data payments. But I am going
18 to use the defendant's exhibit, which is the same one. I
19 can't put my hands quickly on it.

20 THE COURT: So, Mr. DiLorenzo, when you mumble, the
21 poor --

22 MR. DiLORENZO: I'm sorry, Your Honor.

23 THE COURT: Listen to me. The poor reporter doesn't
24 know whether to take your mumbles down or not. Let me know
25 when you want your mumbles reduced to writing.

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1 MR. DiLORENZO: I don't, Your Honor.

2 THE COURT: Okay.

3 MR DiLORENZO: I'd like to introduce, if it is not
4 in evidence, Defense Exhibit 268.

5 THE COURT: One second.

6 THE COURTRoom DEPUTY: It is not.

7 MR. ZEITLIN: What exhibit number?

8 THE COURTRoom DEPUTY: 268.

9 THE COURT: Defense Exhibit 268. Let me take a look
10 at it and find it.

11 MR. DiLORENZO: Can I show it to the jury,
12 Your Honor.

13 THE COURT: Just one second. So --

14 MR. DiLORENZO: You know what, Your Honor? I'm
15 sorry, Plaintiff's Exhibit 99 is already in evidence. I will
16 use that one.

17 THE COURT: Plaintiff's Exhibit 99.

18 MR. DiLORENZO: Although I would like to offer 268
19 in evidence.

20 THE COURT: You want 268 in? It may be duplicative,
21 is what you are saying?

22 MR. DiLORENZO: It may be.

23 THE COURT: No harm. There's no objection. Defense
24 Exhibit 268 in evidence at this time.

25 (Defense Exhibit 268 received in evidence.)

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1 Q Mr. Barger, we heard a claim in the opening statement
2 that one of the things you claim that was done improperly was
3 you were forced to go on Family Medical Leave Act when you
4 didn't want to; is that correct? You wanted to keep working,
5 right?

6 A Yes. I wanted -- I have always wanted to work.
7 Absolutely.

8 Q Right.

9 And you wanted to be paid full-time for working,
10 right, full-time pay?

11 A Yes.

12 Q Okay. And in the opening statement it was stated that
13 you were put on unpaid leave against your will. I'd like you
14 to take a look at these payroll documents that your attorneys
15 put into evidence. The first one deals with the payday of --
16 I think it is 8-15-2016; do you see that?

17 A Yes, sir.

18 Q And this is before you went on leave, right?

19 A I don't remember the dates, but I will stipulate --

20 Q So this one looks like you got \$20,000, the top number at
21 the top under current, it has year to date and current, do you
22 see \$20,000 --

23 A I do.

24 Q -- and 334,000.

25 And down at bottom there's a current distribution,

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1 which I believe is your net pay for the two-week period?

2 A Okay.

3 Q 12,076?

4 A Yes.

5 Q And so is the next document, which is across from it,
6 which is for 8-31; do you see that?

7 A Yes, sir.

8 Q And I think these two, which is the next page of that
9 exhibit, shows the same payment numbers through to 9-30 --

10 A I do.

11 Q -- 2016.

12 So this is after you had the surgery, still full
13 pay, right?

14 A Yes, sir.

15 Q The next one -- the next two are for the period 10-14 and
16 10-31, and the numbers are all the same; do you see that?

17 A Yes, sir.

18 Q Now we're coming up to the time where you get put on the
19 leave, right? The first one, which is November 5 -- I'm
20 sorry, November 15, 20,000 and 12,000; do you see that?

21 A Yes, sir.

22 Q And then the end of November is 20,000 and 12,000; do you
23 see that?

24 A Yes, sir.

25 Q The next one has a gross pay of 174,000 on 12-15; do you

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1 see that?

2 A That was my bonus.

3 Q That's your bonus, right? And the distribution was
4 115,000?

5 A Yes, sir.

6 Q And then for December 15, the same date, same pay date in
7 the two documents, this one says 10,000 and the current is
8 7,200?

9 A I see that.

10 Q So that's what you got paid, and that's the first time
11 you have had a payment below those regular numbers while you
12 were on disability, right? While you were on leave?

13 A It appears that way, yes.

14 Q And was there a mistake in that pay that it was too low?
15 You don't know?

16 A I have no idea.

17 Q The next page, which covers the period of 12-30, is the
18 pay date. Do you see the current payment is 22,000 --

19 A Yes.

20 Q -- 929?

21 A Yes.

22 Q And the distribution is 15,000?

23 A Yes.

24 Q So it is actually higher than your regular pay was,
25 before you went on leave?

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1 A Looks like it.

2 Q And it looks like it is making up for a mistake in a
3 deduction that was made in the earlier one.

4 The next payment, which is for 1-31?

5 A Yes.

6 Q That's got 22,000 and 11,000, which is also higher than
7 your regular pay, right?

8 A Yes.

9 Q And then the 2-15, you produced a return to work notice
10 that was effective 1-17; do you remember that? You could come
11 back to work with no restrictions on 1-17?

12 A Yes.

13 Q And this pay date is -- and you got paid through the end
14 of February, right? You were put back on the payroll from the
15 17th of January through the end of February?

16 A Yes.

17 Q Because you had been returned -- you had the return to
18 work notice with no restrictions?

19 A Tony mentioned to me that they were going to continue to
20 pay me until, I believe, February. I don't remember the date,
21 but --

22 Q So this is back to your regular pay of 20,000, 11,110?

23 A Right.

24 Q Now, these are the documents your lawyers put in
25 yesterday --

1 A Right.

2 Q -- that show your pay for that period?

3 A Yes.

4 Q Do you agree with me that you were not put on an unpaid
5 leave during that time period?

6 A I don't know what the ramifications of saying unpaid are,
7 or if this was something that was agreed to because I had not
8 signed an agreement. So that they pay -- I will say this,
9 they paid me during that time. That's what I will say.

10 Q Well, you became eligible for disability pay during that
11 time, didn't you?

12 MR. ZEITLIN: Your Honor, I think these documents
13 speak for themselves. It's just bolstering --

14 THE COURT: Look. I am being a little distracted
15 because I am going over the charge now. But we are about
16 ready to take a little bit of a 15-minute break, I suspect.
17 Do you want to ask one or two more questions?

18 MR. DiLORENZO: I can just finish these documents.
19 They are the same exhibit.

20 THE COURT: Same exhibit.

21 MR. DiLORENZO: Part of the same exhibit.

22 THE COURT: Ask one or two more questions, and we
23 will take a break.

24 Q I forgot to show you February 28, the last payment. Do
25 you see that?

1 A Yes.

2 Q And it is the same 20,000 as your pay before you were put
3 on leave and after?

4 A Yes, sir.

5 MR. DiLORENZO: And the last checks I have are
6 Defendant Exhibit 249, Your Honor.

7 THE COURT: Are they in evidence?

8 MR. DiLORENZO: Not yet, I don't think.

9 THE COURTRoom DEPUTY: No.

10 THE COURT: In evidence now.

11 (Defense Exhibit 249 received in evidence.)

12 Q Do you recognize these MetLife long-term disability
13 checks that you received?

14 A I do.

15 Q One is for \$13,852?

16 A Yes.

17 Q And one is for \$27,705 --

18 A I do.

19 Q -- right?

20 And those were LTD that was paid retroactively for
21 some of this time period?

22 A When I got these, I gave them to my attorney because I
23 had no idea. I had not agreed to go on long-term disability,
24 and I got these checks. I gave them to my attorney, and they
25 are in an escrow account. I never --

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1 THE COURT: Did you deposit those checks?

2 THE WITNESS: No.

3 THE COURT: Those checks have not been used by you?

4 THE WITNESS: No.

5 THE COURT: You gave them to the attorneys?

6 THE WITNESS: Yes.

7 THE COURT: That is his answer.

8 Q But you weren't disabled you, you had a return to work
9 from the doctor that you have no restrictions?

10 A I didn't know the intention of these. With all of these
11 things going on, I am not an attorney, I knew that I was not
12 on long-term disability, and that's why I gave them to my
13 attorney. I wasn't going to cash them.

14 THE COURT: You didn't cash the checks because you
15 didn't believe you were on long-term disability?

16 THE WITNESS: Exactly.

17 THE COURT: That's his answer.

18 Q How about that \$50,000 for the intellectual property?
19 Have you returned that to the company after you discovered it
20 wasn't included in the contract?

21 A That was an agreement between Joe and myself. I told you
22 that. It's already been answered.

23 THE COURT: Explain what that's all about. You kept
24 that money, right?

25 THE WITNESS: Yes.

1 THE COURT: He explained that. Why don't we take --

2 MR. DiLORENZO: Stop here, Your Honor?

3 THE COURT: -- a break now, unless -- let me ask you
4 this, so I have a sense, Mr. DiLorenzo. How much more
5 questioning do you have?

6 MR. DiLORENZO: I think I am going to be able to
7 wrap up fairly quickly, Your Honor. Maybe 20 minutes, 25
8 minutes.

9 THE COURT: Okay. We are going to try to do that,
10 and we are going to try to complete his testimony, if we can,
11 before lunch break.

12 Let's take a 15-minute recess, but before we do,
13 Mr. Innelli told me that juror number 6 would like to leave by
14 4:30 for sufficient reasons. I think that's a reasonable
15 accomodation, using the ADA law, right? So we are going to
16 grant that accommodation. No problem. We may even leave a
17 little earlier. We will see how it goes. But you don't have
18 to worry about that, okay?

19 THE COURTROOM DEPUTY: All rise.

20 (WHEREUPON, at 11:29 a.m., the jury exited the
21 courtroom and a recess was had from 11:29 a.m. to 12:00 p.m.)

22 (Continued on the next page.)

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PROCEEDINGS

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1 (Open court; no jury present.)

2 THE COURT: While Mr. Innelli is getting the jury,
3 it will be good if we can complete at least his testimony
4 before lunch, and then we will talk about a lot of these
5 issues that are bedazzling the judge. I am not so sure I'm
6 smart enough to sort out all these complex issues that you are
7 throwing at me. We'll talk about it, though, right? I see a
8 bunch of inconsistencies which we will talk about.

9 Mr. Shearer, you are trying to challenge me as to
10 whether I should take senior status again, or whether I am
11 still able to do this job.

12 We will do the best we can, but there are a bunch of
13 things to talk about. This is kind of a commingled complex
14 couple of tea which you are presenting to me to try to sort
15 out in my old age, okay?

16 (Continued on the next page.)

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1 (WHEREUPON, at 12:13 p.m., the jury re-entered the
2 courtroom.)

3 THE COURT: All right. Folks, the game plan is to
4 see if we can complete Mr. Barger's before lunch break. Let's
5 see if we can do that.

6 And during the course of the day, there are a number
7 of legal matters which I have to talk to counsel about at the
8 stage of the trial. This is the type of thing that happens.
9 We have to make sure we have a charge that we can present to
10 you. And so those are legal matters which I am not going to
11 burden you with, but I think we still can make good use of
12 your time today, and maybe we can finish the testimonial part
13 of the trial. Let's see what we can do now.

14 Mr. DiLorenzo, let's see if you can wrap it up.

15 MR. DiLORENZO: I will do the best I can,
16 Your Honor.

17 THE COURT: All right. Let us know when you are
18 okay. Okay, Mr. Barger?

19 THE WITNESS: Yes, sir.

20 THE COURT: Are you okay?

21 THE WITNESS: Yes. Sorry.

22 THE COURT: Okay. Good.

23 CROSS-EXAMINATION

24 BY MR. DiLORENZO: (Continued)

25 Q Mr. Barger, yesterday you testified to what this

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1 termination cost you, which is what I understand you are
2 asking for in damages; am I correct?

3 THE COURT: What was the question?

4 MR. DiLORENZO: The testimony he gave yesterday was
5 this is what this termination cost me. I am asking if
6 those --

7 THE COURT: Okay. So he gave that testimony. So
8 what's your question?

9 MR. DiLORENZO: My question is, is that what he's
10 asking for in damages. Do we have his request for damages?

11 MR. ZEITLIN: Again, it is a lay witness.

12 MR. DiLORENZO: Yes, but there's no expert. I still
13 haven't heard --

14 THE COURT: It is okay. What's your request for
15 damages? Let's hear it again. You gave testimony that you're
16 entitled to a lot of money, right?

17 THE WITNESS: Yes.

18 THE COURT: And now Mr. DiLorenzo wants to find out
19 why. You need to get to the nitty gritty of why you think you
20 are entitled to that money.

21 Is that basically what you want to do?

22 MR. DiLORENZO: Yes, Your Honor.

23 Q And the amounts in light of these payments you received
24 during the disability payments.

25 THE COURT: Yes. So you got some payments during

1 your disability. We know that, right?

2 THE WITNESS: Yes.

3 THE COURT: And you still think you are entitled to
4 money by reason of this lawsuit --

5 THE WITNESS: The answer is yes.

6 THE COURT: Explain why in addition to the -- why
7 you are entitled to money.

8 He said he didn't cash the disability check.

9 MR. DiLORENZO: Well, yeah, but the other payments
10 the 20,000 a month --

11 THE COURT: You had some other payments.

12 MR. DiLORENZO: I don't think those were included --

13 THE COURT: Explain again why you think --

14 MR. DiLORENZO: In fact, Your Honor, if it is easier
15 for him, I can just see if I got it right from my notes from
16 yesterday.

17 THE COURT: All right. So you read it, and tell me
18 whether you agree.

19 Q And if you disagree with me, you tell me.

20 What I understood you to say was you used some kind
21 of a software package for the period of March 2017 to
22 September of 2019, which was the backpay claim? And you
23 applied a 4.5 percent. I don't know if that was a present
24 discounted value. 4 percent? Discounted present value? 4
25 percent on top of it?

1 A Since you are talking from March to September, it was the
2 pay I would have received, plus bonuses, less the amount of
3 consulting fees that I was paid in this software, setting
4 interest rate should be around 4 percent. So that's what I
5 put in.

6 Q So you gave us the bottom line, which is 1.36 --
7 1,360,000. But I don't know what --

8 A I don't have the paper in front of me. Something close
9 to that.

10 Q So I don't know what number you used for income, I don't
11 know what number you used for bonus, and I don't know what
12 number you used for an offset. Your tax return for that year
13 shows 450,000 or something like that?

14 A I'm sorry, I do not remember. I am just giving you the
15 30,000 foot level. I'm sorry. The individual numbers are
16 what to end up -- what the software calculated it to be, and
17 that's the numbers. I'm sorry if I don't have the month by
18 month numbers.

19 Q Well, the problem is, I can't tell how you did it, I
20 don't know what the software says, I don't know if the
21 methodology is correct, I don't know if the numbers are right.
22 There's no basis for me to attack this summary or question.
23 Maybe it is the right number, but I have no basis
24 whatsoever --

25 THE COURT: This is your summary, this is what you

1 think you are entitled to. He wants to know specifically the
2 breakdown, how you came to that calculation.

3 THE WITNESS: I testified about that yesterday.

4 THE COURT: You explained it all yesterday?

5 THE WITNESS: Yes.

6 MR. DiLORENZO: This is the same explanation we got
7 today. This is the exact same one we got today as the one
8 yesterday. It doesn't have any details.

9 THE COURT: We can argue what that means in terms of
10 the law, but he gave the testimony --

11 MR. DiLORENZO: Okay.

12 THE COURT: -- that's what he relied on. There's
13 nothing else you wish to offer?

14 THE WITNESS: No.

15 Q So can you give me the second -- so one piece is
16 1,360,000, the second piece is 1,470,000, that's the seven
17 years?

18 A It's exactly what I said yesterday.

19 Q You can't remember what it is now? There's a discounted
20 projected earnings based on seven years to change the culture?

21 A It started. So it started. The projections going
22 forward from September until about 53 months, with the
23 assumption of the same salary and bonus, and the assumption of
24 the consultant fees that were subtracted from that. And the
25 software said it had to be discounted by 4 percent.

1 Q Did you project consultant fees increasing every year?

2 A You know what? I do not -- I plugged in 53 different
3 months. I cannot remember the detail, and I'm sorry. You are
4 asking me specific -- whatever I said yesterday is what I say
5 today.

6 Q Well, yesterday with respect to this issue, you said, "I
7 projected earnings I would have as a consultant." You didn't
8 tell us what they were. So I am asking if they went up, down,
9 stayed the same? Because that's an offset for us in your
10 calculation.

11 A Yeah. They were the same rate. I don't remember what
12 that was. I'm sorry, Counselor.

13 Q And you have 900,000 in for stock options?

14 A Yeah. That was a calculation of the unvested stock
15 options that I believe the price when it went public, when
16 they, First Data, went public.

17 Q So it is these three numbers combined, 1.360, 1.47
18 million, and 900,000?

19 A Yes, that's what I testified yesterday.

20 Q Did you ever ask for a reasonable accommodation under the
21 Americans With Disabilities Act while you worked at First
22 Data?

23 A I don't know what that means. Would you explain that in
24 laymen's terms?

25 Q Did you ever ask, based on your disability, that you

1 needed something to be able to do the essential functions of
2 your job?

3 A I just wanted access to my technology.

4 Q And other than what we heard on -- from other witnesses
5 that -- other witnesses that you were deprived -- there was an
6 e-mail I think that was sent to your address on a Saturday
7 concerning some disability forms, your assistant was
8 monitoring your e-mail, she forwarded it to your personal
9 e-mail the following Monday. Other than that, was there
10 anything that you claim you suffered or lost because you were
11 not on e-mail access?

12 A Are you asking me, at that -- on that particular date?

13 Q No, I am asking the entire time you were denied access to
14 the e-mail system, what harm did it cause you?

15 A Other than the fact that I just wanted to stay abreast of
16 what was going on, I -- we had a program called the Good
17 system that allowed me to go in and communicate with virtually
18 everybody. I don't know the technical terms, but I could hook
19 up with everybody, and I could still go on, if I wanted to.
20 If they wanted to have a videoconference, I could see them,
21 just technology stuff.

22 Q But after you filled out all the paperwork for
23 disability, you understood you weren't supposed to be working
24 anymore, you had received those payments because you weren't
25 to work? You were on disability?

1 A I don't know if I understand. That may be the technical
2 definition of it. I still felt a personal responsibility to
3 check in every once in a while. That's why I wanted it. I
4 cared about the employees I was working with.

5 MR. DiLORENZO: Your Honor, I would like to offer
6 Defense Exhibit 85 into evidence.

7 THE COURT: Defense Exhibit 85?

8 MR. DiLORENZO: Yes, Your Honor.

9 THE COURT: Let's take a look. Defense Exhibit 85.
10 Okay. I see it. No objection. We will allow it.

11 (Defense Exhibit 85 received in evidence.)

12 Q Mr. Barger, this is an e-mail, I am not sure if I am
13 pronouncing the name right, Gita Patel?

14 A Gita Patel.

15 Q She's your administrative assistant?

16 A Yes, sir.

17 Q This is an e-mail that -- I'm not sure, to be honest with
18 you, who it is from. Your name is on here. But it summarizes
19 a discussion with Michael Baddour at Emory.

20 And down at the bottom it says: Finally, to be
21 honest and frank, you need to give some real thought to
22 planning retirement; do you see that?

23 MR. SHEARER: Objection, Your Honor.

24 THE COURT: Overruled.

25 Q Do you see that?

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1 THE COURT: The question is, do you see that?

2 That's the question.

3 Q I don't want to make you read it.

4 THE COURT: Listen to me.

5 A I see it.

6 THE COURT: The question is whether you see that.

7 THE WITNESS: Yes, sir.

8 THE COURT: Yes or no; you see it?

9 THE WITNESS: I do.

10 THE COURT: He sees it.

11 Q Okay. I am going to read it because I don't want to make
12 you read it. Finally, to be honest and frank, you need to
13 give some real thought to planning retirement. I think
14 whatever comes next will take some steam out of you for a
15 while. I don't think worrying about a work schedule will help
16 you heal or help you make the best decisions. We'll be in
17 touch.

18 And that's from Aaron Rogers?

19 A Yes.

20 Q Who is Aaron Rogers?

21 A Dr. Rogers.

22 Q He's a doctor as well?

23 A Yes.

24 Q Your doctor?

25 A He was someone that when I had the fissures in my throat,

1 and his expertise was the esophagus, and he was concerned I
2 was not going to heal rapidly.

3 Q And this advice that he gave you with e-mail, it was
4 similar, very similar, wasn't it, to what Tony Marino told you
5 as to why he wanted to put you on -- have you apply for leave
6 and receive leave of absence?

7 A I didn't apply for it.

8 Q Well, you signed the papers --

9 A I did.

10 Q -- requesting it?

11 A Because he asked me to.

12 Q Okay. But you still had to sign -- if you didn't sign
13 them, you wouldn't have got it, right? You almost didn't make
14 the deadline as it was, right?

15 A He asked me to. That's why I -- if he had not asked me
16 that, I wouldn't have.

17 Q Then you got help from Rhonda to fill them out, right?

18 A After Tony asked me to, I said I would do it.

19 Q And my only question was, isn't that similar, almost
20 identical to what Mr. Marino was telling you at the time, as
21 to why he wanted you to focus on getting better?

22 A Yes.

23 Q Work stress -- I mean, is it your understanding that work
24 stress helps people get better from medical issues?

25 A It sure helped me. I got better faster than this doctor

1 expected.

2 Q And it helped you by not having access to work?

3 A No. Every time I -- every doctor I saw was amazed that I
4 healed so much faster than they'd ever seen before. So I
5 was -- when he mentioned about retirement, that was a joke to
6 me.

7 Q But the speed with which you started to heal ahead of
8 schedule started in November and December --

9 A It was through every operation.

10 Q -- and early January?

11 A Everything that I went through, every doctor at every
12 juncture, every speech therapist, everyone said they've never
13 had anybody heal faster than I have.

14 THE COURT: He wanted to work until he was 300 years
15 old, and all the stress turns him on. Okay. Next question.

16 MR. DiLORENZO: We only have a few things to cover
17 here.

18 We offer into evidence Defense Exhibit 113.

19 THE COURT: 113. Okay. In evidence now.

20 (Defense Exhibit 113 received in evidence.)

21 Q Mr. Barger, this is another e-mail while you were out, it
22 is November 8, from you to a number of people I assume that
23 were on your team?

24 A Yes.

25 Q Justin Stamey is on here, for example, Julie Kelly?

1 A Great people.

2 Q And this says: Moving forward, please cc me on all
3 communication. Too many things are moving through the system
4 without my knowledge?

5 A Yes.

6 Q And this was because you weren't working full-time,
7 right?

8 A Not necessarily. It may have been that all of the things
9 that were moving rapidly, I was not getting reports on,
10 possibly.

11 Q And it says: Thanks for protecting me from working.
12 Is that what was going on?

13 A My charge for them was you take over while I'm gone. You
14 guys know how to run the business.

15 THE COURT: Well, wait a second. You said they took
16 over while you were gone?

17 THE WITNESS: I gave them responsibilities and
18 that's why I checked in.

19 THE COURT: You were gone so somebody else had to do
20 what you were doing, is that what you're saying?

21 THE WITNESS: No. Their own responsibilities.

22 THE COURT: You were still issuing orders like you
23 were working full-time, right?

24 THE WITNESS: Absolutely.

25 THE COURT: Never missed a beat?

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1 THE WITNESS: Didn't.

2 THE COURT: Next question.

3 Q So why do you thank them for protecting you from work?

4 A They were basically working hard for me. That was the
5 compliment to them because they were all very caring people.

6 Q And they weren't copying you on the things that they
7 would normally copy you on?

8 A Some would.

9 MR. DiLORENZO: Defense Exhibit 110.

10 THE COURT: In evidence.

11 (Defense Exhibit 110 received in evidence.)

12 Q Can you take a look at Defense Exhibit 110. This is an
13 e-mail from you to Rhonda Johnson. Do you see that?

14 A I do.

15 Q One of the individual defendants. And you are thanking
16 her for proactively taking care of business in my absence; do
17 you see that?

18 A Yeah. She actually helped me --

19 Q No question.

20 A Okay.

21 THE COURT: She was taking care of business in your
22 absence?

23 THE WITNESS: She helped me, yes, she did.

24 THE COURT: Okay. Next question.

25 Q I'm sorry, she what?

1 THE COURT: She helped him.

2 A She helped me, yes.

3 MR. DiLORENZO: Defense Exhibit 104.

4 THE COURT: In evidence.

5 (Defense Exhibit 104 received in evidence.)

6 Q Would you take a look at what's in evidence as Defense
7 Exhibit 104. This is another e-mail from you to Ms. Johnson,
8 dated October 12. It says: You are the best that ever was.
9 I'm on too many meds.

10 Do you mean too many medications?

11 A On that current day, I probably was.

12 MR. DiLORENZO: We offer Defense Exhibit D-127 into
13 evidence.

14 THE COURT: In evidence.

15 (Defense Exhibit 127 received in evidence.)

16 Q This is another e-mail from Rhonda Johnson to you.
17 There's a chain of them that you send her, and one on the 21st
18 saying will you help me with these papers today.

19 A Yes, I had --

20 Q She writes back: Absolutely. Do you want me to come by
21 your home this afternoon or prefer I speak with your wife
22 directly.

23 These are the disability papers that everybody fills
24 out for disability?

25 A Yes. I was confused on some things.

1 Q You weren't able to do it by yourself without her help?

2 A Yes. She's the expert. That's why I asked her.

3 Q No, but these are same disability papers that anybody
4 fills out, right?

5 A I don't know if they are disability. They were papers.

6 I don't know what they were about. But I needed some help.

7 Thank you.

8 MR. DiLORENZO: This might be in evidence already.

9 It is Defense Exhibit 108 and Plaintiff's 81, I think.

10 THE COURT: 108. Not in evidence yet.

11 MR. DiLORENZO: Maybe that's a deposition number.
12 108 is definitely defendant's.

13 THE COURT: Excuse me, you want Defense Exhibit 108
14 in evidence?

15 MR. DiLORENZO: Yes, Your Honor.

16 THE COURT: You want that in evidence?

17 MR. DiLORENZO: Yes.

18 THE COURT: No objection. It is in evidence.

19 (Defense Exhibit 108 received in evidence.)

20 Q This one's from Rhonda Johnson to you and Justin Stamey
21 and Paula Lessen. Is she a director -- was she a director in
22 your sales organization, sales training organization?

23 A Yes. Both Justin and Paula worked for me, absolutely.

24 Q And if you go down further in the e-mail, there's a
25 discussion of -- there's a reference to in your e-mail a level

1 of confusion here that didn't exist under Rhonda's leadership?

2 A Right.

3 Q You can't take a step backward when it comes to covering
4 up our partner growth plans. Rhonda, please make me feel
5 better about this head count challenge that affects our
6 partners. What is that in reference to?

7 A I don't remember the intent of -- if it was about
8 Rhonda's help deciphering challenges in the HR side and
9 somehow I did not have her input. I was probably looking for
10 it.

11 Q And there's a second page to the e-mail, which is a list
12 of people, including you. Is that a list of head counts in
13 the department?

14 A It looks like that.

15 Q And on the flip side of the first page, it says Andy
16 plans to load all 68 for the Wednesday load unless we tell him
17 differently.

18 Who is Andy?

19 A It may -- I don't remember. It may have been someone
20 that everybody communicated with that would make certain a
21 head count was put into the system at a certain time.

22 Q There's a note that says: Let Justin and I know how you
23 want to proceed with the socialization exercise with Jeff
24 Hack.

25 Do you know what that reference is to?

1 A It is probably about our businesses that required us to
2 hire more people, and we need to socialize the open reqs,
3 would be my guess.

4 Q Socialize them?

5 A That's a term I learned in First Data. That means you
6 talk about them.

7 MR. DiLORENZO: Okay. I offer Defendant's Exhibit
8 066 in evidence.

9 THE COURT: Just one second. 066. In evidence now,
10 Defense Exhibit 66.

11 (Defense Exhibit 66 received in evidence.)

12 Q This is an e-mail from a David Short. It looks like he
13 received an e-mail from you on the 28th, and he writes to --
14 David Short writes to Kathleen Short on the 2nd, saying: This
15 is from the guy who never responds to me, Steve Barger, the
16 interim boss.

17 Do you know this David Short?

18 A Yes. I promoted David Short to run Omaha from just being
19 a training specialist.

20 Q When you first came in with -- when you first came in and
21 took over this group, was it indicated that it would be on an
22 interim basis or short-term?

23 A We weren't sure that we knew that we were eventually
24 going to have to find somebody to take over the training side,
25 because I was doing other things.

1 Q Now, there was a lot of testimony yesterday about
2 successorship. You were involved in conversations to find a
3 successor for you, weren't you?

4 A A successor for the training responsibilities.

5 Q Right. I thought we established earlier with your
6 testimony that that's all the responsibilities there were,
7 were the training through the sales organization. And once in
8 a while you would talk to some groups about the
9 transformation?

10 A The intent, and it is one of the reasons that I hired
11 Justin, was to come in and learn and try to accept some
12 responsibility for the overall organization so that he could
13 take over some of the responsibilities and I could go back to
14 my original thoughts.

15 MR. DiLORENZO: Your Honor, we offer Defense Exhibit
16 70 into evidence.

17 THE COURT: 70?

18 MR. DiLORENZO: Yes.

19 THE COURT: In evidence at this time.

20 (Defense Exhibit 70 received in evidence.)

21 Q So, Mr. Barger, this is a chain of e-mails that you are
22 involved in. Talk about some things on the front page, but I
23 want to ask you about what's on the back.

24 A Yes.

25 Q On the back it says, it is from -- you are cc'd on it.

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1 It is to Kim Hoefer. It says: Kim, due to budget restraints,
2 the search for Steve's replacement has to be postponed for the
3 interim.

4 A Yes.

5 Q And that's dated March 17, 2015.

6 A Yes.

7 Q Almost a year before you're diagnosed with cancer,
8 correct?

9 A Yeah.

10 Q You testified earlier when the judge asked you why you
11 think, had you not gotten cancer or gone out on leave, you
12 would not have been laid off in that group of ten percent of
13 the top 3,000 highest paid managers; do you remember that
14 testimony?

15 A Yes.

16 Q And the reason I think you gave was you thought that
17 Dan -- the conversation with Dan Charron, you would have got
18 to work on getting some of these other groups and trying to
19 get more responsibility for them; is that your testimony?

20 A Among other things.

21 Q What are the other things? I didn't hear you say
22 anything else.

23 A During all this transition when Joe left and Mr. Charron
24 came in, there was a lot of stuff going on in terms of who was
25 going to report to who, et cetera, et cetera.

1 I took my conversations with Dan to be, you know, we
2 get this training thing, training thing, meaning if we expand
3 the amount of responsibility that you have, because of your
4 \$40,000 a month, that it will justify it in his mind what I
5 should be making. And I agreed to expanding it and putting it
6 all under one leadership made all the sense in the world so
7 that we had consistent messaging.

8 So as I was starting to go through that, trying to
9 make connections to make that happen, and then this occurred,
10 I felt like it was probably -- I thought it was a brilliant
11 idea that we continue that process and consolidate all of that
12 so the messaging should be consistent throughout the company.
13 And the biggest challenge was on the servicing side. And all
14 of the people and all the head counts exiting the company, and
15 that became a bastion for me to fix that, and that's why I
16 agreed with Dan, and thought we should -- thought I was going
17 to come back and fix that. That was my mind-set.

18 Q And there were other training groups in the organization,
19 right?

20 A Oh, yeah.

21 Q Including human resources, did that have the largest
22 training group?

23 A You know, I don't know, Omaha, Hagerstown, the call
24 centers, the servicing part under Christine Larsen, those were
25 in complete shambles, and he knew it. We talked about it.

1 Q Did they have worse turnover than your group?

2 A There was a time when the turnover in the company was
3 pretty significant. Mine was trying to clean some things up
4 and then ensure the year that I was there to find the right
5 people.

6 Q You don't know if theirs was worse than yours?

7 A It was bad.

8 Q You don't know if theirs was worse than yours?

9 A I don't know the number, but in our conversations, we
10 both agreed, it had to be fixed. So that became a brilliant
11 strategy.

12 Q Your salary was in like the top 1 or 2 percent, right, of
13 the company, at 54?

14 A I don't do the math. If you say it is 1 percent, that's
15 fine.

16 Q I don't think it is 1 percent --

17 A Okay.

18 Q -- I think it is a little bit higher, like 1.5 --

19 A Okay.

20 Q -- or something like that, 1.25?

21 A Okay.

22 Q So that would have put you on a high target level for
23 this reduction in force, right?

24 A Apparently.

25 Q Now, when you did your calculation of damages, did you

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1 take into account your earnings -- your income in 2017 for the
2 entire year? You left us in -- you left First Data, I think,
3 at the end of February; do you remember that?

4 A My calculations started March of '17.

5 Q Yes. Did you include the money you earned from March
6 until December? Because according to your tax returns, you
7 have about \$470,000 in earnings that year, and only 62 or 61
8 of it came from First Data?

9 A I do not remember. I'm sorry.

10 MR. DiLORENZO: Your Honor, I would like to
11 introduce Defense Exhibit 43. And I'm not trying to violate
12 privacy here. We can probably just do the first page.

13 THE COURT: Yes. We will allow the first page. I
14 am not going to allow all of it.

15 (Defense Exhibit 43, first page only, received in
16 evidence.)

17 Q See if this refreshes your recollection, Mr. Barger.
18 Where it says income, wages, salary, tips, et cetera, attach
19 W-2s, it has 478,427; do you see that?

20 A I do.

21 (Continued on the next page.)

22

23

24

25

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1 BY MR. DiLORENZO:

2 Q And earlier you told me what you wanted to see. This
3 is the earlier page from Defendant's exhibit 268, which is
4 in evidence. It shows the \$20,000 for the month through
5 February 28 pay period ending. There is the 20,000 but it's
6 got year to date, which is the last payment you got for that
7 year, which is 62,000 from us. So there is another 420,000
8 or so on this tax return for 2017?

9 A I'm assuming those were stock.

10 Q Stock from where?

11 A Options invested, would be my guess.

12 Q First Data stock?

13 A Yes.

14 Q Do you know that or?

15 A My accountant does all of this. I'm guessing that's
16 what it was.

17 Q Are you making a lot more now -- in -- we did 2017 --
18 2018, which is also included in your years, as well as 2019
19 going forward, are you making a great deal more money than
20 you did in the consulting firm of your sons back in 2012 and
21 2013?

22 A I'm slowly working my way up. I'm into ten to 15,000,
23 trying to get 20. It fluctuates, yes.

24 Q Ten to 15 for the year?

25 A No, per month. That's what I told you that I ended up

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1 deducting from my projections.

2 MR. DiLORENZO: Your Honor, I'd like to offer
3 Defendant's exhibit 44 and Defendant's exhibit 41, which are
4 tax returns, at least the front page, for 2013 and 2014,
5 which are the two years immediately before he came to First
6 Data.

7 THE COURT: I'll allow the first page. 44 and 41?

8 MR. DiLORENZO: Yes, your Honor.

9 THE COURT: That's sufficient.

10 MR. DiLORENZO: I'm sorry, your Honor, I made a
11 mistake.

12 THE COURT: 44, the first page.

13 MR. DiLORENZO: Definitely 41.

14 THE COURT: One second, 44 is in evidence, 2014,
15 first page.

16 And 41 first page as well?

17 MR. DiLORENZO: 41 is definitely the first page.

18 I'm sorry, your Honor. The years are 2012 and
19 2013. They are 40 and 41.

20 THE COURT: First page, we'll allow those in.

21 (Defense Exhibit 40 and 41 received in evidence.)

22 BY MR. DiLORENZO:

23 Q Mr. Barger, this is a tax return for 2012, the combined
24 adjusted gross income I think is a negative number, 17,000.
25 Do you see that?

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1 A Yes.

2 Q So 2012 is a negative number, that's Exhibit 40.

3 And Exhibit 41, which is 2013, is immediately before
4 you came to First Data, it's another negative number?

5 A Yes.

6 Q Minus 14,000?

7 A Yes.

8 Q That's for the year, right, those are for both years,
9 right?

10 A Yes.

11 Q You received correspondence from MetLife concerning
12 your disability claims --

13 THE COURT: We're going to take a lunch break by
14 one, how much longer do you have?

15 MR. DiLORENZO: Five minutes, your Honor.

16 THE COURT: Let's try to finish with the
17 cross-examination at this time.

18 THE WITNESS: I'm ready.

19 MR. DiLORENZO: Your Honor, we offer into evidence
20 Defendant's exhibit 201.

21 THE COURT: Okay. No objection. We'll allow
22 that.

23 (Defense Exhibit 201 received in evidence.)

24 BY MR. DiLORENZO:

25 Q Mr. Barger, you see this letter from MetLife?

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1 A I do.

2 Q Underneath 'What you need to know,' this is addressed
3 to you, right, at 95 Tamarisk Drive in Georgia?

4 A Yes.

5 Q That was your address at the time?

6 A Yes.

7 Q 'What you need to know. Our records show that you last
8 worked on September 1, 2016. As a result we have approved
9 your disability claim starting September 4, 2016 through
10 October 15.'

11 Do you see that?

12 A Yes. I don't remember this, but I see that it's
13 addressed to me.

14 MR. DiLORENZO: Your Honor, we also would like to
15 offer into evidence Defendant's exhibit 267, three-page
16 document.

17 THE COURT: No objection to that. We'll allow it
18 in.

19 (Defense Exhibit 267 received in evidence.)

20 BY MR. DiLORENZO:

21 Q Mr. Barger, this looks like another letter from MetLife
22 addressed to you at the same location. This one also
23 says -- this one is dated February 3rd; Defendant's exhibit
24 201 is dated January 6. Do you see that?

25 A Yes. I don't remember these, but there is an address

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1 to me, I must have gotten them.

2 Q This one says under, 'What you need to know,' same
3 thing, last worked on September 1st, approved your
4 disability claim starting on September 4. Do you see that?

5 A I do.

6 Q At some point in time, your leave, your FMLA leave
7 notification, was like October 22 or something like that
8 originally?

9 A I thought it was November or something, but I don't
10 know, somewhere in that neighborhood.

11 Q At some point you got notification of a change?

12 A I did.

13 Q Do you recall sending an e-mail being asked when you
14 stopped working? Do you recall that e-mail, Ms. Jennifer
15 Voycheske?

16 MR. DiLORENZO: Your Honor, we offer into evidence
17 Defendant's exhibit 193.

18 A The discrepancy see was the definition of whether I was
19 going into work --

20 THE COURT: There is no question before you.

21 MR. ZEITLIN: He did ask a question, then
22 proceeded to --

23 THE COURT: 193 is offered into evidence. There
24 is no objection. That's in evidence at this time.

25 What is the question you want to ask?

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1 MR. DiLORENZO: I want to offer it into evidence,
2 your Honor. I'm trying to move it along.

3 MR. ZEITLIN: He actually posed a question and my
4 client was trying to answer it. Then he proceeded to go to
5 a document. I would ask the Court permit him to answer the
6 question.

7 THE COURT: You can ask a follow up question.

8 MR. ZEITLIN: Can the reporter read it back?

9 THE COURT: Pardon?

10 MR. ZEITLIN: If the court reporter could read the
11 question back.

12 MR. DiLORENZO: The question was asked by me
13 showing him the document. I asked him, when he hesitated, I
14 said --

15 THE COURT: I wasn't paying attention. Let's hear
16 the question or we'll take an hour to decide what this is
17 about.

18 Can the court reporter read back the question that
19 Mr. DiLorenzo asked before the document was produced?

20 (Whereupon, the record was read.)

21 THE COURT: The question is: Do you recall the
22 e-mail?

23 THE WITNESS: No.

24 THE COURT: He doesn't recall the e-mail. Then
25 you put it into evidence.

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1 MR. DiLORENZO: May I put it in?

2 THE COURT: It's in evidence. No one objected to
3 it.

4 BY MR. DiLORENZO:

5 Q Mr. Barger, this e-mail appears to be from
6 Ms. Voycheske to you. Do you see that?

7 THE COURT: You don't have to ask him if he sees
8 it. What do you want to read from that e-mail?

9 BY MR. DiLORENZO:

10 Q Did you send her an e-mail telling her in response to
11 her question, 'Can you clarify when you stopped working?
12 Was it 9/4/16 or 10/22/16?' And did you write her back,
13 '9/4, my operation was 9/6'?

14 A That's when I stopped going into work, was my take on
15 that. I had no idea that it meant actually not working. My
16 interpretation --

17 Q That's a yes, though, you send her an e-mail?

18 THE COURT: The question is, that e-mail was sent?

19 THE WITNESS: I don't know.

20 THE COURT: You don't know. The e-mail is in
21 evidence. It reads what it reads.

22 Go ahead, next question.

23 MR. DiLORENZO: Your Honor, we offer Defendant's
24 exhibit 188 into evidence.

25 THE COURT: Defendant's exhibit 188. How many

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1 more do you want to put in evidence? The jury has tons of
2 exhibits. If you want them to read it all, we'll be here
3 for a year.

4 MR. DiLORENZO: Our hope is to get them in
5 evidence and simplify --

6 THE COURT: What else do you want in evidence?

7 MR. DiLORENZO: This is the last one, Defendant's
8 exhibit 188.

9 THE COURT: In evidence.

10 (Defense Exhibit 188 received in evidence.)

11 THE COURT: What else? Do you have any other
12 questions of this witness?

13 BY MR. DiLORENZO:

14 Q Mr. Barger, did you receive this letter?

15 A No, I did not.

16 THE COURT: You didn't receive the letter. Okay.

17 MR. DiLORENZO: No more questions, your Honor.

18 THE COURT: Mr. Shearer, let's see whether you can
19 ask him, how many questions do you have before we adjourn?
20 If you can do it now, I'd like to do that.

21 MR. SHEARER: Your Honor, there is pretty long
22 cross.

23 THE COURT: Do you have many questions?

24 MR. SHEARER: More than five minutes.

25 THE COURT: We'll take our lunch break, jurors.

PROCEEDINGS

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1 We'll meet back at 2:15. I have some things to talk to the
2 lawyers about. Don't talk about the case.

3 (Jury exits the courtroom.)

4 COURTROOM DEPUTY: You can be seated.

5 You can step down, Mr. Barger.

6 (Whereupon, the witness steps down.)

7 THE COURT: Let me talk a little about some of
8 your legal claims here.

9 Mr. Shearer, I may not be smart enough to figure
10 out your complex claims here. You're claiming under the ADA
11 that he was or was not placed on medical leave. I think
12 your claim is that he was not put on medical leave, that he
13 was never on medical leave. Am I correct or not?

14 MR. SHEARER: No.

15 THE COURT: Not correct?

16 MR. SHEARER: No.

17 THE COURT: I thought you said that he was never
18 was on medical leave because he continued to do his work,
19 even though he was in the hospital, so he was not on medical
20 leave, that's your position.

21 MR. SHEARER: Right.

22 THE COURT: So if he was not on medical leave,
23 then the discrimination was based upon the fact that he was
24 terminated because of his medical disabilities, I guess,
25 right?

PROCEEDINGS

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1 MR. SHEARER: No. From September 6, the date of
2 the surgery there is November 19, the date that Tony sent
3 him the letter and said you're going on leave during that
4 period. Mr. Barger continued to work and was not on leave.

5 THE COURT: He was not on medical leave.

6 MR. SHEARER: November 19 when he was forced on to
7 leave --

8 THE COURT: There is no, under the ADA, there is
9 no cause of action to be forced to take medical leave.

10 MR. SHEARER: I think the decision is the change
11 of his terms of his employment based upon his illness. He
12 had to go -- he had to stop working. The terms of --

13 THE COURT: Your position is that he was on
14 medical leave starting in December.

15 MR. SHEARER: November 19.

16 THE COURT: November 19 he was on medical leave.

17 MR. SHEARER: Yes.

18 THE COURT: Before then he was not on medical
19 leave, is your position?

20 MR. SHEARER: Yes.

21 THE COURT: I'm curious as to whether or not the
22 defendant agrees that he was not on medical leave until
23 November -- what date?

24 MR. SHEARER: November 19, is when he got the
25 notice; the paperwork got done the 21st.

PROCEEDINGS

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1 MR. EIDELMAN: That's not the defendant's
2 position. One only needs to look at D154 --

3 THE COURT: No numbers. You're claiming he's on
4 medical leave from the date he went into the hospital,
5 right?

6 MR. EIDELMAN: Yes, your Honor that's our
7 position.

8 MR. DILORENZO: Yes, that's right.

9 THE COURT: So maybe the jury has to decide
10 whether he was or was not on medical leave.

11 MR. EIDELMAN: Except for one fact, Judge. There
12 is a certification from a health care provider that makes
13 him incapacitated by his own doctor on the 22nd.

14 THE COURT: You can argue before the jury.

15 The question of law, though, is whether he was --
16 I understand your position -- you said he was on medical
17 leave from September --

18 MR. EIDELMAN: It is September, Judge, but as the
19 doctor's certification --

20 THE COURT: Because the doctor certified he's on
21 medical leave --

22 MR. EIDELMAN: He can't be disabled under the ADA.

23 THE COURT: One second, calm down. Your position
24 is he was on medical leave starting in September.

25 MR. EIDELMAN: Yes.

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1 MR. ZEITLIN: Your Honor, is it appropriate for
2 the defendant --

3 THE COURT: Sit down.

4 MR. ZEITLIN: -- the defendant's witnesses are in
5 the room.

6 THE COURT: What is wrong with that?

7 MR. ZEITLIN: If the jury can't hear this, why can
8 the witnesses hear this?

9 THE COURT: The defendants are entitled to have
10 their parties in the room, just like you're entitled to have
11 Mr. Barger in the room.

12 MR. ZEITLIN: I'm not talking about the named
13 defendants.

14 THE COURT: Other witnesses are here?

15 MR. ZEITLIN: Correct.

16 MR. DiLORENZO: There was no sequestration, your
17 Honor.

18 THE COURT: There was no request to sequester
19 them. I wasn't aware. We're talking about the legal
20 matters not the testimony of the witnesses.

21 MR. ZEITLIN: I was just making the point.

22 THE COURT: Do you want them to leave the room
23 when we talk about legal matters?

24 MR. ZEITLIN: I think it could influence their
25 testimony.

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1 MR. EIDELMAN: No objection.

2 I don't know how much longer, we have these three
3 witnesses who flew in from out of town to testify today.

4 THE COURT: We will try to accommodate that.

5 We have to continue our discussion. We have lots
6 of inconsistencies and confusion to be sorted out.

7 You now claim that he was not on medical leave
8 until November. You claim he was on medical leave to begin
9 with.

10 Okay, I have to understand your contentions.
11 Don't give me exhibit numbers. Don't give me doctor's
12 testimony. Let's try to sort out what we have to have the
13 jury decide.

14 So does the jury have to decide whether or not he
15 was on medical leave starting in September? What do you
16 think?

17 MR. SHEARER: Yes, whether his leave started in
18 September or November is going be an issue to be decided.

19 THE COURT: It could make a difference when he was
20 on medical leave, right?

21 MR. SHEARER: Yes, it makes a difference.

22 THE COURT: I want to get your positions clear.

23 What difference does it make? Let's take a
24 assumption he was on medical leave starting in September.
25 So if he was on medical leave then, they don't have to

PROCEEDINGS

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1 accommodate time, he's not able to work.

2 MR. SHEARER: The 12 weeks would end, under the
3 FMLA would end --

4 THE COURT: When? So he's entitled to take
5 medical leave under the law for 12 weeks.

6 MR. SHEARER: Right. It would have ended at the
7 12 weeks ending near Thanksgiving.

8 THE COURT: What?

9 MR. SHEARER: Around the end of November.

10 THE COURT: Right. So until then he was entitled
11 to take medical leave, right?

12 MR. SHEARER: If the leave started on the 5th/6th
13 of September it would have ended the end of November. If
14 the leave ended the middle of November, it would have ended
15 the middle of January.

16 THE COURT: So if he was entitled to take medical
17 leave in September and it ended in November, there is no
18 claim here under the ADA because he was entitled to take
19 that leave, right?

20 MR. SHEARER: No. The claim under the ADA is that
21 he was forced to take leave.

22 THE COURT: There is no such theory under the ADA.

23 MR. SHEARER: I know but --

24 THE COURT: The Second Circuit made it very clear,
25 to be forced to take leave is not a viable claim under the

PROCEEDINGS

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1 ADA. It has to be adverse action that was taken. That's
2 not it.

3 MR. SHEARER: I think forcing leave is adverse
4 action.

5 THE COURT: Not according to the Second Circuit.
6 You want to read the law?

7 MR. SHEARER: I'll take a look at it.

8 THE COURT: My clerk will give you the case.

9 Mr. DiLorenzo?

10 MR. DiLORENZO: Part of the confusion is how we
11 start with the claims. ADA claim in this case, one, which
12 your Honor correctly points out, isn't covered to force him
13 on leave.

14 The second one is denying him access, those are
15 the ADA.

16 The dates relate only to the FMLA. They don't
17 relate to anything except denying him the right to come
18 back, that's all that's left under the FMLA. Shawn is
19 right, Mr. Shearer is right, that the dates do effect
20 whether there is even coverage.

21 THE COURT: If he was on medical leave then there
22 is no need to be worried about the e-mail issue because he
23 was on leave. So if he's on leave he doesn't have to be
24 given the right to continue to work because he's on medical
25 leave okay.

PROCEEDINGS

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1 MR. SHEARER: Okay.

2 THE COURT: So if he was not on medical leave,
3 which is what you claim, right, and then he was
4 discriminated against because he was not on leave.
5 Theoretically, I guess that would be some sort of a claim,
6 if his work was diminished or pay was diminished and he was
7 still working and not on medical leave, then we have a claim
8 for discrimination, right?

9 MR. SHEARER: Yes.

10 MR. DiLORENZO: I don't think he is claiming that
11 we denied him access until he went on leave, those things
12 happened simultaneously. Because he went on leave in
13 November that's when he was taken off of access.

14 THE COURT: When is the big deal about the e-mail?
15 When did that happen?

16 MR. DiLORENZO: When he was put on leave.

17 THE COURT: You agree he was on leave as of
18 December, whatever the date was, right?

19 MR. SHEARER: Yes, he was on leave.

20 THE COURT: How can you have a claim for being
21 denied e-mail access if he was on leave at that --

22 MR. SHEARER: It's the act of taking away, that's
23 a change of terms of conditions, the taking away of that
24 access.

25 THE COURT: If he's on leave then he's not

PROCEEDINGS

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1 working, he's on leave. So it doesn't matter whether he has
2 access or not, he's not working.

3 MR. SHEARER: It's the simultaneous action of
4 against his will taking away his work and his access.

5 THE COURT: If he was on leave, he's not working.
6 That's what medical leave is, he's not working.

7 MR. SHEARER: Correct.

8 THE COURT: If he was not on leave, and then they
9 did things too, and that was an adverse type of action, gave
10 him less money, took away work responsibilities, cut off
11 e-mail account, that theoretically is something that could
12 be compensable if in fact he was not on leave.

13 MR. SHEARER: Right.

14 THE COURT: What adverse action was taken? Let's
15 assume that he was not on leave until November 19. The fact
16 that after that he was denied e-mail access doesn't give you
17 anything because he was on leave. You agree?

18 MR. SHEARER: Doesn't give me anything as to?

19 THE COURT: After he was on leave, you agree, you
20 just told me that November 19 was the day, he was on leave.

21 MR. SHEARER: Yes.

22 THE COURT: So after that he doesn't get anything,
23 he's on leave.

24 MR. SHEARER: Right.

25 THE COURT: They can take away his access, whether

PROCEEDINGS

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1 he gets paid or not is a separate issue, whether he's on
2 leave or not, okay, let's put that aside.

3 So let's look at the period of time when you claim
4 he was not on leave. He was operated on. He was fully
5 functional, he didn't miss a beat, he's one of those
6 Herculean people. He's not on leave, that's your position.

7 MR. SHEARER: That's correct.

8 THE COURT: If in fact he was not on leave and he
9 did have a diminishment in his employment responsibilities
10 or his income, I guess that could be cognizable,
11 theoretically.

12 Tell me what happened when he was arguably not on
13 leave from September through November 19, what did he
14 suffer, what adverse consequences?

15 MR. SHEARER: I don't think that we've alleged
16 anything. The very first in the timeline, the first thing
17 we're alleging, was that the forcing of leave violated the
18 ADA.

19 THE COURT: I'm telling you that there is no such
20 claim under the ADA for forcing somebody to take a leave.
21 He was on leave, by your own admission, starting in
22 November 19 I get it, okay. I just want to get your theory.

23 And you are not claiming that when he was not on
24 leave, because he was working even though he's operated on,
25 that he suffered any adverse consequences.

PROCEEDINGS

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1 MR. SHEARER: No.

2 THE COURT: So I don't see the claim that you have
3 here.

4 MR. SHEARER: I guess it is the forcing of leave
5 that I thought was the claim under the ADA.

6 THE COURT: So I'm not so sure that you're correct
7 legally. I think the Second Circuit has said there is no
8 claim under the ADA for forcing somebody to take a leave.

9 Paul, you have that decision?

10 THE LAW CLERK: That applies to the FMLA, Judge.

11 MR. SHEARER: There are cases that say that under
12 the FMLA.

13 THE COURT: But under the ADA if he was forced to
14 take a leave and didn't want to, that would be cognizable?

15 MR. SHEARER: It changes the terms and conditions
16 of his work on the basis of his disability.

17 THE COURT: Okay, so I get a sense. You're
18 claiming here that as of November 19 he was forced to take a
19 leave. And that is the basis of your claim that he should
20 not have been required to take a leave under the --

21 MR. SHEARER: The basis for forcing him to leave
22 was his disability. They've all testified that --

23 THE COURT: Save it for the jury. He was forced
24 to take the leave on the 19th of November and that's your
25 ADA claim.

PROCEEDINGS

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1 MR. SHEARER: Yes.

2 THE COURT: That's his claim, what do you say?

3 MR. DiLORENZO: Your Honor, his doctor certified
4 him --

5 THE COURT: I don't care about the evidence.

6 Theoretically, is that a viable claim?

7 MR. DiLORENZO: No. Because he's not an otherwise
8 qualified individual because his doctor says he's
9 incapacitated. He's not protected under the statute.

10 THE COURT: That's an argument to the jury.

11 MR. DiLORENZO: That's not an argument.

12 THE COURT: He was qualified and forced to take a
13 leave.

14 MR. DiLORENZO: His doctor certified.

15 THE COURT: Argue that to the jury.

16 MR. DiLORENZO: I think it's a legal question,
17 your Honor.

18 THE COURT: The legal question is because the
19 doctor certified him as a matter of law he was not
20 qualified?

21 MR. DiLORENZO: As a matter of medicine he's
22 not --

23 THE COURT: I want to get in my head the legal
24 theory.

25 Your position under the ADA is because November 19

PROCEEDINGS

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1 he was forced to take a leave, regardless if he's paid or
2 not, that in itself is the violation of the ADA.

3 MR. SHEARER: That's a change.

4 THE COURT: He wasn't allowed to work.

5 As far as the other is concerned, I don't want to
6 deal with that right now. Just one at a time.

7 I think I have your ADA claim down now, and we'll
8 talk about the other one later on.

9 We'll reconvene at 2:15 after lunch.

10 (Lunch recess taken at 1:10 p.m.)

11 (Continued on the next page.)

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S. Barger - Redirect/Mr. Shearer

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AFTERNOON SESSION

(In open court.)

(Parties present.)

THE COURT: Bring the jurors in.

6 You were very helpful, Mr. Shearer, both of you in
7 helping me focus on how to shape the charge. I will have
8 something to you for sure in the not too distant future. I
9 think I got to now, it's not a simple cup of tea, and we'll
10 have something to talk about and I'm sure we'll be able to put
11 it all together.

COURTROOM DEPUTY: Jury entering. All rise.

(Jury enters courtroom at 2:28 p.m.)

COURTROOM DEPUTY: You can all be seated.

THE COURT: Go ahead. Redirect, Mr. Shearer.

16 | REDIRECT EXAMINATION

17 | BY MR. SHEARER:

18 | Q Mr. Barger.

19 MR. SHEARER: And, your Honor, I want to clear up a
20 housekeeping matter.

21 Q Mr. Barger, do you know this document which is
22 Plaintiff's Exhibit 13?

23 | THE COURT: Is it in evidence?

24 MR. SHEARER: Yes.

25 | THE COURT: Don't ask him.

S. Barger - Redirect/Mr. Shearer

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1 MR. SHEARER: No, it's not in evidence yet.

2 THE COURT: It's in evidence now because there's no
3 objection to it. Don't ask him if he knows it, it just wastes
4 our time. It's in evidence. If you want to read from it go
5 ahead.

6 (Plaintiff's Exhibit 13 was received in evidence as
7 of this date.)

8 Q In your --

9 Can you comment on how you believe Joe Plumeri makes
10 decisions on hiring and firing?

11 MR. DILORENZO: Objection.

12 THE COURT: Repetitious. We don't need it. Next
13 question. We heard so much about it. He's testified,
14 everyone has testified, the jury understands all that.

15 Get to the points.

16 Q In your career, did you ever take a reduction of salary
17 voluntarily?

18 THE COURT: You can answer that question.

19 A Yes, sir.

20 Q When was that and why?

21 A When Joe and I were at Primerica, they had an amount of
22 money that he needed to give some other people in the company
23 that he promoted and I took a reduction in salary and in bonus
24 so that they could be included.

25 THE COURT: You've been a good team player. You and

S. Barger - Redirect/Mr. Shearer

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1 Joe cooperated with each other. You know each other a long
2 time. I think the jury understands the nature of your
3 relationship.

4 Next question.

5 Q They briefly brought up Justin Stamey. Can you tell me
6 why you hired Justin Stamey?

7 A Yes. I needed some help in our training area and Justin
8 had been a trainer and then went to the field as in sales.
9 And, just a minute, and then I had conversations and the best
10 choice for him and for me was to have him come help us on the
11 sales side.

12 THE COURT: You knew he was a company guy who could
13 help out?

14 THE WITNESS: Absolutely, Judge.

15 THE COURT: Next question.

16 Q I wanted to talk about your tax returns quickly.

17 They presented you the 2012-2013 tax returns which
18 were small numbers in terms of income?

19 A Yes.

20 Q Why was your income at that amount?

21 A All the income that was generated I actually gave to my
22 son and his family.

23 THE COURT: I'm sorry. Why was it so low during
24 those years?

25 THE WITNESS: All the income was given to my son.

S. Barger - Redirect/Mr. Shearer

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1 THE COURT: It was all given to your son?

2 THE WITNESS: Yes.

3 THE COURT: You're a good father. You gave the
4 money to your son.

5 THE WITNESS: Yes, sir.

6 EXAMINATION BY

7 MR. SHEARER:

8 (Continuing.)

9 Q That was inside of that consulting LLC?

10 A Yes.

11 Q That you talked about yesterday?

12 A Yes.

13 Q And in 2017, the numbers 400,000 and some, do you know
14 what those -- why it was so high that year?

15 A Yes. That was bonuses I had been paid in prior years in
16 stock that I exercised.

17 THE COURT: You didn't give those to your son.

18 THE WITNESS: No, sir.

19 Q So those were stock awards that you were given for your
20 work for First Data?

21 A Yes in prior years.

22 Q Okay. In Defendant's Exhibit 193, if you remember that
23 e-mail, it's the one that when did I stop working the 9/4,
24 surgery 9/6 e-mail. Do you recall that one?

25 What did you think the question was of you when she

S. Barger - Redirect/Mr. Shearer

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1 asked you?

2 THE COURT: That's not a good question. Try a
3 different way.

4 This is September 4th or September 6th, is that what
5 you're talking about in this e-mail?

6 MR. SHEARER: Yes.

7 THE COURT: So do want to read those e-mails to the
8 jurors and to the plaintiff you can do that.

9 Q Do you recall this one?

10 THE COURT: Don't ask him if he recalls that, we'll
11 be here forever.

12 THE WITNESS: Yes.

13 THE COURT: Do you want to read it.

14 MR. SHEARER: And the date on this is January 5th.
15 I'd like to go to Plaintiff's 47?

16 THE COURT: It's in evidence, right?

17 MR. SHEARER: Yes.

18 THE COURT: What do you want to bring out?

19 COURTROOM DEPUTY: No, it's not. Not yet.

20 THE COURT: 47?

21 MR. SHEARER: Plaintiff's 47.

22 THE COURT: It's not in evidence yet. Do you want
23 that in evidence? There's no objection to it.

24 MR. SHEARER: Yes.

25 THE COURT: In evidence.

S. Barger - Redirect/Mr. Shearer

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1 (Plaintiff's Exhibit 47 was received in evidence as
2 of this date.)

3 THE COURT: What's your question?

4 EXAMINATION BY

5 MR. SHEARER:

6 (Continuing.)

7 Q This is an e-mail that you sent to Rhonda Johnson on
8 December 16th asking what your last day worked was. Did you
9 ever get an answer to that question?

10 THE WITNESS: I think I may have to read this, your
11 Honor.

12 THE COURT: Read it. There's an e-mail you sent to
13 Rhonda Johnson. You got a response from her.

14 THE WITNESS: It's from her I, have to see what she
15 said.

16 THE COURT: You want to read that e-mail now?

17 THE WITNESS: I got it.

18 Q I want to know whether you received an answer to his
19 question from Rhonda?

20 A I don't remember.

21 THE COURT: You don't remember. Next question.

22 MR. SHEARER: Then Plaintiff's No. 48.

23 THE COURT: 48. You want that in evidence now?

24 MR. SHEARER: Yes.

25 THE COURT: Okay, that's in evidence.

S. Barger - Redirect/Mr. Shearer

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1 (Plaintiff's Exhibit 48 was received in evidence as
2 of this date.)

3 EXAMINATION BY

4 MR. SHEARER:

5 (Continuing.)

6 Q This bottom e-mail that you were copied on. This is a
7 Rhonda turnaround and forwarded this on to ask
8 Leave Management, right?

9 Did Leave Management get back to you with your last
10 day worked?

11 THE COURT: What was the question?

12 Q Did Leave Management, after Rhonda asked Leave Management
13 what your last day worked was, did Leave Management get back
14 to you?

15 A They have.

16 Q One more up here real quick.

17 MR. SHEARER: Plaintiff's 49.

18 THE COURT: 49. You want that in evidence?

19 MR. SHEARER: Yes, Your Honor.

20 THE COURT: No objection. In evidence.

21 (Plaintiff's Exhibit 49 was received in evidence as
22 of this date.)

23 Q And this is an e-mail from -- that you were copied on or
24 Leave Management says that your manager would need to verify
25 your last day worked.

S. Barger - Redirect/Mr. Shearer

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1 Did your manager, at this time, was that Jeff Hack?

2 A I believe it was on 12/16, I believe it was Jeffrey Trudy
3 and Sharon.

4 Q Did Jeff Hack tell you when your last day of work was?

5 A Never.

6 Q They went through your all those pay stubs --

7 A Yes.

8 Q -- showing your pay?

9 A Yes, sir.

10 Q And your full pay went through the end of November as I
11 remember. That is how you recall it?

12 A If that's what's entered. My recall.

13 Q Okay. I'd like to go to --

14 Do you remember when you first received your FMLA
15 paperwork to complete?

16 A Actual day, no. I'm going to say it was fourth quarter
17 of '16. I don't know a date, I'm sorry.

18 THE COURT: Fourth quarter, meaning what? November,
19 December? Somewhere around that, 2016?

20 THE WITNESS: Yes, sir.

21 THE COURT: Next question.

22 Q Now, when you were discussing your damages, I believe you
23 made a mistake. Did you mean to say you did your stock
24 options calculation based on price at the IPO?

25 A The stock options as to what the conversion price was.

S. Barger - Redirect/Mr. Shearer

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1 Q This 900,000 is calculated as of the IPO?

2 A It was based on -- I know this. It was based on a \$31
3 valuation, which probably was the IPO when they first went
4 public. I'm sure of that because the stock initially was
5 worth less than that.

6 THE COURT: We don't need that. You answered the
7 question.

8 Q Just a couple more questions.

9 The defendant showed you the MetLife letters that
10 were approving your short-term disability and your long-term
11 disability. Did MetLife ever talk to you? Did they call you
12 on the phone? Did they write to you? How did you get
13 information to MetLife?

14 A I don't recall talking to anyone. Documents came,
15 various documents came, and some I've never seen before so I
16 cannot answer that question.

17 THE COURT: You don't know how they came to you
18 particularly?

19 THE WITNESS: No.

20 THE COURT: Next question.

21 Q Do you recall ever telling MetLife that you stopped
22 working on September 6th?

23 A No. I worked from September 6th all the way through I
24 was told not to work and then I didn't go in the office but I
25 did work.

S. Barger - Recross/Mr. DiLorenzo

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1 MR. SHEARER: That's it, your Honor.

2 THE COURT: Anything further, Mr. DiLorenzo?

3 MR. DILORENZO: One question.

4 RECROSS EXAMINATION

5 BY MR. DILORENZO:

6 Q You came up with the 900,000, did that number come out
7 evenly, \$900,000?

8 A It's rounded. I'm sure it's rounded. I don't know if
9 that accurate or not, it's a rounding.

10 MR. DILORENZO: At some point, I have a motion on
11 that testimony.

12 THE COURT: He said he rounded it out. It's your
13 answer.

14 MR. DILORENZO: All the damages testimony.

15 THE COURT: Anything else. You want to ask him?

16 MR. DILORENZO: No, Your Honor.

17 THE COURT: Anything else, Mr. Shearer.

18 MR. SHEARER: No, Your Honor.

19 THE COURT: You may step down. Take a glass of
20 water just relax.

21 (Witness leaves the witness stand.)

22 THE COURT: What do we have next, Mr. Shearer? Do
23 we have any more live witnesses?

24 MR. SHEARER: Well, your Honor, we were going to
25 read in some depositions.

Proceedings

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1 THE COURT: No, it's still your case. Does this
2 complete your live testimony? We're not talking about the
3 defendant's case, we're talking about yours.

4 MR. SHEARER: I was going to read in a deposition of
5 a witness that is present, so I don't know.

6 MR. EIDELMAN: Your Honor.

7 THE COURT: Do you have any problem with reading in
8 the deposition? Do you know what he's talking about?

9 MR. EIDELMAN: I made a recommendation. I said to
10 Mr. Zeitlin and Mr. Shearer, and you have to explain it to the
11 jury, that we brought these witnesses in from out of town. We
12 can take them out of turn where we would do the direct, which
13 would be very short. He can then cross them. One of those
14 witnesses, he would not need their deposition testimony then.

15 THE COURT: What do you say, Mr. Shearer? We don't
16 want to have a long colloquy here while the jury is watching
17 us.

18 Do you have any other people that you want to call
19 as a witness?

20 MR. SHEARER: Yes, I do, I guess.

21 THE COURT: Call them.

22 MR. SHEARER: Okay.

23 THE COURT: Who do we have now?

24 MR. SHEARER: This is Matt Cagwin.

25 (Witness takes the witness stand.)

M. Cagwin - Direct/Mr. Shearer

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1 COURTROOM DEPUTY: Good afternoon, Mr. Cagwin. Take
2 the witness stand. If you can remain standing and raise your
3 right hand.

4 **MATT CAGWIN**, called by the Plaintiff, having been first duly
5 sworn, was examined and testified as follows:

6 THE WITNESS: Yes.

7 COURTROOM DEPUTY: Thank you. Please have a seat.
8 State and spell your name for the record.

9 THE WITNESS: Matt Cagwin. C-a-g-w-i-n.

10 COURTROOM DEPUTY: Thank you.

11 THE COURT: Your witness, Mr. Shearer.

12 MR. SHEARER: Thank you, your Honor.

13 DIRECT EXAMINATION

14 BY MR. SHEARER:

15 Q Hi, Mr. Cagwin. You're an employee of First Data; is
16 that correct?

17 A That's correct.

18 Q What is your title and -- what are your title and
19 responsibilities?

20 A My title is GBS CFO. I'm responsible for the finance
21 function of the GBS segment.

22 Q Okay. And have you held other titles in the last two
23 years?

24 A Yes. Prior to that, I was our accounting officer.

25 Q How long were you the chief accounting officer?

M. Cagwin - Direct/Mr. Shearer

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1 A About four years.

2 Q Okay. And what years were those?

3 A The end of '14 through the end of last year.

4 THE COURT: First Data has merged now with Fiserv;
5 right?

6 THE WITNESS: They have.

7 THE COURT: You said you worked for First Data?

8 THE WITNESS: I work for Fiserv, thank you.

9 Q We had a deposition, I asked you about the 10K and --

10 THE COURT: Stop mumbling.

11 MR. SHEARER: I'm going to bring up the 10K.

12 THE COURT: Stop. It's hard for me to understand
13 you when you mumble like that. Ask him a question, that's why
14 he's a witness.

15 MR. SHEARER: I'm going to go to Plaintiff's Exhibit
16 No. 10.

17 THE COURT: You want to show him Plaintiff's
18 Exhibit 10?

19 MR. SHEARER: Yes.

20 THE COURT: Is that in evidence?

21 MR. SHEARER: No.

22 THE COURT: All right. Let's see whether or not
23 there's any objection.

24 All right. There's no objection to Exhibit No. 10.
25 It's in evidence.

M. Cagwin - Direct/Mr. Shearer

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1 (Plaintiff's Exhibit 10 was received in evidence as
2 of this date.)

3 THE COURT: Now do you have a question to ask him?
4 Ask him.

5 EXAMINATION BY

6 MR. SHEARER:

7 (Continuing.)

8 Q This is First Data's 2017 Form 10K. There's a section in
9 here on Page 36 that's entitled "Restructuring and Cost
10 Management Initiatives."

11 Would you like me to pull that up for you?

12 A Please.

13 THE COURT: He doesn't care what you pull up. Ask
14 him a question.

15 Q Restructuring and cost management, it's the second title
16 down on the right-hand side.

17 Do you see that?

18 A I do.

19 THE COURT: He sees it.

20 Next question.

21 Q Can you tell me what it means when it says, "We
22 continually evaluate our cost basis and over the past three
23 years have executed a number of restructuring initiatives
24 which has allowed us to streamline management, eliminate
25 excess facilities, and work with our suppliers."

M. Cagwin - Direct/Mr. Shearer

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1 Can you tell me what that means?

2 THE COURT: You just read it.

3 MR. SHEARER: I'm trying to ask him what it means.

4 THE COURT: Do you have anything to add to that?

5 THE WITNESS: I think it means what it says.

6 Q What does "cost basis" mean "cost base"?

7 A Our total expenses. The expense to run the company.

8 Q So this is you're constantly evaluating expenses and
9 taking it, restructuring initiatives; right?

10 A We're constantly looking at ways to streamline our cost
11 structure including restructuring activities.

12 Q So how many restructuring events occurred at First Data
13 over 2014 to 2017?

14 A Approximately ten plus.

15 THE COURT: About ten?

16 THE WITNESS: About ten.

17 Q How many of those included terminations of employees?

18 A Virtually all.

19 THE COURT: About how many?

20 THE WITNESS: Almost all.

21 THE COURT: Almost all.

22 Q And that's 2014 to 2017?

23 A Correct.

24 Q What was the rough operating expense of First Data in
25 2017?

M. Cagwin - Direct/Mr. Shearer

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1 A In 2017, it's a couple pages later on, but it's roughly
2 \$4 or \$5 billion.

3 Q The operating expense?

4 A Correct.

5 Q And is it -- there was a category within that, are you
6 familiar with the Other Operating Expense?

7 A I am.

8 Q And what is included in Other Operating Expense?

9 A Our other operating expenses are any of our expenses that
10 are of an abnormal thing of nature: Restructuring,
11 litigation, settlements, things of that nature greater than
12 \$5 million.

13 Q Were the 2017 Other Operating expenses 143 million?

14 A That sounds correct.

15 Q So out of that 143 million, how much was restructuring
16 costs?

17 A A little more than 80 million.

18 Q So 80 million, that means that 80 million in severance
19 payments in 2017, is that what that means?

20 A Correct.

21 Q And out of the 143 million of Other Operating Expense, of
22 which 83 million --

23 MR. SHEARER: Strike that.

24 Q So \$83 million in cost due to terminations in 2017?

25 A Correct.

M. Cagwin - Direct/Mr. Shearer

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1 Q Do you know why management chooses to incur \$83 million
2 of restructuring expense? Why does it incur up front
3 \$83 million of expenses to terminate people?

4 A To treat our employees fairly when we're taking an action
5 to restructure our company. So we're providing them
6 compensation to help them bridge between jobs while we get our
7 company or expense base to the right levels and invest our
8 money where we can add value and grow the company.

9 Q When I deposed you, you said you'd been with First Data
10 approximately 18 quarterly periods. I guess it's been three
11 more since then. So out of those 21 quarterly periods, how
12 many quarters had restructuring expenses related to the
13 termination of employees?

14 A I believe my answer originally was most of the quarters.
15 And since then, the answer probably would be the same. It
16 would be the same.

17 Q So most of those 21 quarters they were restructures?

18 A They were expenses related to the restructuring
19 initiative.

20 Q That involved the termination of employees?

21 A Correct.

22 Q Out of the -- did that pattern continue where the
23 restructuring expense was a large, significantly large,
24 portion of the Other Operating Expense for 2018?

25 A No. During '18, the percentage probably declined a

M. Cagwin - Direct/Mr. Shearer

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1 little bit because we had some deal and deal integration costs
2 which is related to our merger with Fiserv. Still a large
3 portion of it but not the same percentage.

4 MR. SHEARER: I would like to go to Plaintiff's
5 Exhibit 6?

6 THE COURT: That's in evidence now; right?

7 COURTRoom DEPUTY: It is now.

8 THE COURT: Plaintiff's Exhibit 6 in evidence. No
9 objection.

10 (Plaintiff's Exhibit 6 was received in evidence as
11 of this date.)

12 MR. EIDELMAN: Your Honor, in our book Exhibit 6
13 says "reserved."

14 MR. SHEARER: We gave you a copy of it the other
15 day.

16 MR. EIDELMAN: It's the restructuring policy, okay.

17 MR. SHEARER: Yes.

18 EXAMINATION BY

19 MR. SHEARER:

20 (Continuing.)

21 Q First Data, has what's called a Restructuring Accounting
22 Policy; correct?

23 A That's correct.

24 Q And what's the purpose of that policy?

25 A To ensure that we account for our restructuring properly

M. Cagwin - Direct/Mr. Shearer

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1 under the accounting rules.

2 Q So what's the difference between the accounting treatment
3 of termination expenses if they are a restructuring versus a
4 normal expense?

5 A The accounting rules require for a restructuring
6 initiative to disclose data about that information in your SEC
7 filings.

8 Q Does it impact any other if it's categorized as a
9 restructuring instead of normal expense? Does it affect any
10 other numbers that the finance department calculates?

11 A Yes, it does. We also, this is our choice, but we
12 defined our definitions of our non-GAAP measures. These are
13 measures we use with the investor community. Things like
14 adjusted net income and adjusted EBITDA. We would exclude
15 restructuring initiatives where we would not exclude normal
16 day-to-day severance expense.

17 Q So EBITDA is Earnings Before Interest --

18 A Taxes Depreciation.

19 Q -- and Amortization?

20 A Correct.

21 Q So if it's a normal expense, it reduce us your earnings.
22 And if it's a normal expense, it has no change to EBITDA; is
23 that correct?

24 A If it's a normal expense, it would reduce the EBITDA. If
25 it was a restructuring, it would not.

M. Cagwin - Direct/Mr. Shearer

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1 Q Okay. And so, categorizing -- it's a benefit to your
2 EBITDA number if it's categorized as a restructuring?

3 A Correct.

4 Q And it's a benefit to your net adjusted income number if
5 it's a restructuring?

6 A That's correct.

7 Q And those numbers, are they used inside of First Data's
8 bonus plans?

9 A No.

10 Q Neither net adjusted income or EBITDA are used inside
11 of --

12 A Overall performance is used to determine the bonus plan.
13 Those are measures that might be considered but there's not a
14 defined plan with those measures in it.

15 Q Did you track the savings, projected savings, from a
16 restructuring? Did the finance department track to see the
17 actuals matched the projections after a restructuring, the
18 terminating, of employees happened?

19 A We talked about it before. We have different kinds of
20 restructurings. Our level of tracking for a RIF, when you're
21 doing a reduction in force, you basically track to see the
22 employee leave and you know you'll get the savings from it
23 because there is no ongoing cost.

24 There is a separate kind of program where we might
25 be shutting down a facility or a location. In those

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1 situations, we have business case where we monitor all the
2 through fruitions to make sure that the new cost of the new
3 employees you hire and the new location relative to the old
4 has a return to respecting.

5 Q So you don't check to make sure the position, in a RIF
6 situation, that the position eliminated not subsequently
7 refilled and the cost returns?

8 A I do not do that.

9 Q Are restructuring events such as RIFs and other
10 termination events, are they -- are you able to tell one from
11 the other if they cross accounting periods?

12 A Generally, yes.

13 Q Okay. And you can run those as separate projects they
14 don't blur together?

15 A It depends on how close they are done together.
16 Sometimes we start an initiative, don't accomplish the goals
17 we're trying to do, and we may add another one on. In those
18 situations, we combine them together. But if there is a
19 lengthy period of time between the two, we would track them as
20 separate initiatives.

21 Q Okay. One more exhibit. Plaintiff's 81.

22 THE COURT: All right. There's no objection that's
23 in evidence now.

24 Q We talked about this at your deposition. This is a new
25 hire orientation master schedule for, I believe, February.

M. Cagwin - Direct/Mr. Shearer

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1 You're listed as speaker in February, the end of January.

2 Can you tell me what this new hire orientation is?

3 A This is a new hire orientation we do for all the
4 employees in the Atlanta office and we rotate leaders through
5 that to present. The column I'm in is to do a business
6 overview for the new hires so they get an understanding of
7 First Data at the time.

8 At the same time, at that meeting, there would also
9 be HR present before and they'd give an update on the HR
10 policies, benefits, and things of that nature.

11 Q So First Data, at this point, is a complete schedule for
12 all the new hires that are coming in in 2017?

13 A No, this is a schedule of -- the training sessions are
14 schedule every two weeks throughout the year because most of
15 our senior leaders are very busy people and travel a fair bit.
16 They came some out when we would be bringing on new employees.

17 Q First Data schedules these new hire orientations every
18 two weeks, they were scheduling them every two weeks in 2017?

19 A Correct.

20 MR. SHEARER: No further questions.

21 THE COURT: Any questions.

22 MR. EIDELMAN: Very briefly.

23 CROSS-EXAMINATION

24 BY MR. EIDELMAN:

25 Q Good afternoon, Mr. Cagwin.

M. Cagwin - Cross/Mr. Eidelman

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1 A Good afternoon.

2 Q You said, I believe, correctly that you were the chief
3 accounting officer of First Data for 2014 to 2017; is that
4 correct?

5 A Actually to the end of '18.

6 Q It the end of '18, I apologize.

7 Are you a certified public accountant, a CPA?

8 A I am.

9 Q As part of your duties and responsibilities as the chief
10 accounting officer of First Data, were you responsible for the
11 public filings, the one that Mr. Shearer just showed you, the
12 10K, was that apart of your duties and responsibilities?

13 A It was.

14 Q Mr. Shearer showed you, and I'll actually mark it into
15 evidence, your Honor, on D-36, please.

16 THE COURT: Okay.

17 (Defendant's Exhibit D-36 was marked in evidence as
18 of this date.)

19 Q You're familiar with First Data's Restructuring
20 Accounting Policy, Mr. Cagwin?

21 A I am.

22 Q And what was your role in connection with the
23 Restructuring Accounting Policy?

24 A So, as the chief accounting officer, I am responsible for
25 all accounting policies including this one.

M. Cagwin - Cross/Mr. Eidelman

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1 Q Did you create this policy?

2 A I did.

3 Q Mr. Shearer asked you some questions about the reduction
4 in force that occurred in 2016-2017, the spans and layers
5 reduction in force that affected 362 employees.

6 Are you familiar with that restructuring?

7 A I am.

8 Q Did First Data apply the restructuring policy, D-36, in
9 connection with that restructuring?

10 A We did.

11 Q And were the results of that pursuant to the
12 restructuring included with the public filings?

13 A It was.

14 Q We had some testimony yesterday from Mr. Marino, the
15 human resources officer, that the salary expense savings from
16 the 2016-2017 reduction in force of the top 3,000 managers was
17 about \$44 million in base salary.

18 Were there additional projected savings from that
19 reduction in force?

20 A Yes, there was. There were also other benefits. The
21 total savings from that initiative was about \$53 million.

22 Q \$53 million total for that particular restructuring
23 event?

24 A That's correct.

25 Q What was the savings -- what was the severance expense

M. Cagwin - Cross/Mr. Eidelman

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1 that the company allocated to, as you say, take care of those
2 employees who were going to be impacted by that reduction in
3 force?

4 A Approximately \$22 million.

5 Q D-63, Judge, please.

6 THE COURT: D-63.

7 (Defendant's Exhibit D-63 was marked in evidence as
8 of this date.)

9 Q Mr. Cagwin, showing you what's been marked as D-63, can
10 you identify that, please?

11 A This is a purchase order between First Data and
12 Barger Group.

13 Q And you understand, do you not, Mr. Cagwin that this was
14 the purchase order that was put into place when Mr. Barger
15 became a consultant for First Data on or about March 17th of
16 2014?

17 A That's correct.

18 Q And there's a number here that says that the total number
19 is \$400,000.

20 What does that indicate?

21 A So that's the amount that has been approved to spend up
22 to. So his future services provided under the contract we had
23 with Barger Group, we would then apply those invoices against
24 this \$400,000 in an amount to be authorized and paid up to
25 that amount.

M. Cagwin - Cross/Mr. Eidelman

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1 Q Does this mean that \$400,000 is automatically going to be
2 spent?

3 A No, only for services provided.

4 Q What was the process in 2014 if an invoice came in with
5 respect to getting it approved to be paid pursuant to the
6 purchase order?

7 A The vendor would send the invoice into the Accounts
8 Payable Department, the P.O. number would be applied to that
9 and automatically paid.

10 Q If there was just a purchase order number, it didn't need
11 a signature, it would just get paid so long as it didn't come
12 up against the ceiling of \$400,000?

13 A That's correct.

14 Q Does First Data, at the time that you were the chief
15 accounting officer, have an outside auditing accounting and
16 firm?

17 A We did. We used Ernst & Young.

18 Q Did Ernst & Young audit the financial statements
19 including the 10K that was referred to in which the
20 restructuring event that occurred in 2016-2017 involved the
21 top \$3,000 employees. Did they review those and audit those
22 financial statements?

23 A They did.

24 Q Did First Data receive a clean audit as a result of that
25 audit by Ernst & Young, your outside accounting firm?

M. Cagwin - Redirect/Mr. Shearer

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1 A We received a clean opinion.

2 MR. EIDELMAN: If I may confer with my colleagues
3 just one second.

4 THE COURT: Go ahead.

5 (A brief pause in the proceedings was held.)

6 MR. EIDELMAN: Your Honor, I have no further
7 questions for Mr. Cagwin.

8 THE COURT: Anything else, Mr. Shearer.

9 MR. SHEARER: A couple.

10 REDIRECT EXAMINATION

11 BY MR. SHEARER:

12 Q Mr. Cagwin, you said the 2016-2017 event saved 53 million
13 in salary, is that what the number was?

14 A No, salaries and benefits.

15 Q And that's simply just calculating what the salary and
16 benefits of the people that were terminated were, is that how
17 you come up with that number?

18 A That's correct.

19 Q That only, that's a savings that you get over time, isn't
20 that right? It's not 53 million right away?

21 A No, it's the next 12 months after they exit the company.

22 Q And that's why I was asking the question whether you
23 monitor whether there were backfills. How do you know that
24 that 53 million is actually saved and you're not just rehiring
25 someone else and paying them?

M. Cagwin - Redirect/Mr. Shearer

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1 A I think we talked about it before. We actually monitor
2 our overall head count. And during this period of time, our
3 head count declined about 2,000 heads while we acquired three
4 large companies adding about 500 heads to our company. So
5 that's how we know we didn't add back more. Some were not
6 relevant. It's more about we terminate these individuals,
7 save some money, but we also reinvest so we can grow our
8 company to make sure we're a profitable enterprise.

9 (Continued on the next page.)

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1 BY MR. SHEARER:

2 Q So you use the savings from terminations to buy other
3 companies?

4 A We use savings and invest in growth opportunities,
5 including buying other companies.

6 Q And you use savings from terminated employees to make
7 other investments; is that correct?

8 A That's correct.

9 Q In 2016/2017 was First Data in any way close or on the
10 verge of a bankruptcy?

11 A So five years ago when Frank joined, we were in
12 desperate times. We had lost money for many years before
13 that. The first three years with us we were losing money as
14 well. It started to turn about 2016/2017 and continued to
15 improve since then.

16 Q It was profitable though in 2016, wasn't it?

17 A It was.

18 Q In 2017?

19 A Correct.

20 Q Also in 2018?

21 A Correct. Because the initiative we've taken over that
22 five-year period.

23 Q You're talking about the payment of these purchase
24 orders. If someone has got an agreement in a purchase order
25 number and that comes into accounts payable, they

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1 automatically just pay it?

2 A During the time of that invoice, yes.

3 Q There were no internal controls inside of accounts
4 payable to check to make sure that the invoice was correct?

5 A There were no controls to validate the service
6 provided.

7 Q And no requirement that any management sign and approve
8 the invoice?

9 A No.

10 Q You think that's standard internal procedure for a
11 public company?

12 A There are other companies I've worked with that have
13 similar controls; we have tightened the controls up since.

14 Q What have you done?

15 A Now our --

16 MR. EIDELMAN: Your Honor --

17 THE COURT: Sustained.

18 MR. SHEARER: That's it. Thank you.

19 MR. EIDELMAN: I have no further questions for
20 Mr. Cagwin.

21 THE COURT: You may step down.

22 (Whereupon, the witness was excused.)

23 THE COURT: Listen to me, I want to know if you
24 have anymore live witnesses you wish to call as part of
25 plaintiff's case?

PROCEEDINGS

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1 MR. SHEARER: No.

2 MR. EIDELMAN: Your Honor, I brought two
3 witnesses --

4 THE COURT: One second.

5 MR. EIDELMAN: If he wants to call them, he can.

6 THE COURT: I'm asking him, are there other
7 people, it's your choice, you don't have to call them.

8 You're finished with your live witnesses?

9 MR. SHEARER: Yes.

10 THE COURT: Okay. Do you have anything else you
11 wish to present as part of your case?

12 MR. SHEARER: I have two short depositions to read
13 and one that is longer.

14 THE COURT: How long?

15 MR. SHEARER: One of them is -- two of them are
16 probably ten minutes.

17 THE COURT: Collectively?

18 MR. SHEARER: Ten minutes each, one of them about
19 half an hour.

20 THE COURT: Mr. Eidelman, you have people who came
21 here from long distance?

22 MR. EIDELMAN: Yes.

23 THE COURT: I will let you take them out of turn
24 if you would like to do.

25 MR. EIDELMAN: I will do that.

PROCEEDINGS

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1 THE COURT: We want to accommodate them if we can.
2 We won't go past 4:30. Do you think that your witnesses
3 will be finished by then.

4 MR. EIDELMAN: From my perspective, certainly.

5 THE COURT: Let's have it.

6 We're potentially truncating the plaintiff's case
7 a little bit. He wants to read some deposition testimony,
8 he can do that. We're taking the witnesses out of turn,
9 part of the defendant's case, which technically hasn't
10 happened yet because the plaintiff hasn't completed with his
11 case, which he will be the reading of deposition testimony.

12 MR. EIDELMAN: Your Honor, we call Jennifer
13 Voycheske.

14 (Witness takes the witness stand.)

15 JENNIFER VOYCHESKE, called as a witness,
16 having been first duly sworn/affirmed, was examined and
17 testified as follows:

18 COURTROOM DEPUTY: Remain standing raise your
19 right hand.

20 THE WITNESS: I do.

21 COURTROOM DEPUTY: Have a seat. Keep your voice
22 up, and state and spell your name.

23 THE WITNESS: Jennifer, J-E-N-N-I-F-E-R,
24 Voycheske, V-O-Y-C-H-E-S-K-E.

25 THE COURT: You may not have to get that close to

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1 the microphone. We'll see how it goes.

2 DIRECT EXAMINATION

3 BY MR. EIDELMAN:

4 Q Good afternoon, Ms. Voycheske.

5 A Hello.

6 Q What is your current title?

7 A Manager of HR Operations.

8 Q Are you involved with something called the HR Service
9 Center at First Data?

10 A I am a manager in that department.

11 THE COURT: First Data now is Fiserv.

12 MR. EIDELMAN: Yes, thank you for the
13 clarification, Judge. Thank you.

14 Q How long have you been employed at First Data/Fiserv?

15 A Since 2002.

16 Q How long have you been the manager of the HRSC?

17 A May 2015.

18 Q What are your duties and responsibilities as the
19 manager?

20 A I manage the administrative process related to leave of
21 absence within the organization.

22 Q Why does First Data have a human resources services
23 there, what is the function?

24 A It serves as a first level of support for a multiple HR
25 functions, leave of absence, payroll, employment,

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1 unemployment claims, those types of things.

2 THE COURT: Where is it located?

3 THE WITNESS: Omaha, Nebraska.

4 THE COURT: Is that where you're from?

5 THE WITNESS: Yes.

6 BY MR. EIDELMAN:

7 Q Approximately how many people out of 22,000 people
8 pre-Fiserv, the 22,000 that work First Data, at any given
9 time how many people make a leave of absence, which requires
10 the assistance from the human services center?

11 A Approximately 1100 per month.

12 Q What types of leaves might that be?

13 A They can include the leaves under the Family Medical
14 Leave Act, FMLA, Americans with Disability Act, ADA, also a
15 military leave policy, a paid parental leave policy, as well
16 as worker's compensation.

17 Q Does your department also handle accommodations under
18 the Americans with Disabilities Act?

19 A We do.

20 Q At any given time how many people would be on an
21 accommodation?

22 A Between one to 200.

23 MR. EIDELMAN: Defendants 30, Judge, move the
24 admission.

25 THE COURT: Let see, that's not in evidence yet.

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1 MR. EIDELMAN: It is not, Judge.

2 THE COURT: Let me find it. No objection,
3 Defendant's exhibit 30 is in.

4 (Defense Exhibit 30 received in evidence.)

5 Q Are you familiar with the Equal Employment Opportunity
6 policy that is on your screen?

7 A Yes, I am.

8 Q What is the basis, what is the need or what is the
9 Equal Employment Opportunity policy at First Data?

10 A Essentially that First Data won't discriminate on a
11 number of things in relation of employment.

12 Q Is there a reference to the Americans with Disabilities
13 Act in the EEO policy?

14 A It does state we will make reasonable accommodations to
15 qualified individuals with known disabilities.

16 Q What is a qualified individual?

17 A It's an individual that has certain acts of daily
18 living that they are unable to perform, that are stated by
19 the physician that would impact their ability to do their
20 job.

21 Q Unless they have an accommodation to be able to do?

22 A Correct, they need an accommodation to do that job at
23 100 percent.

24 MR. EIDELMAN: Your Honor, I think these are in
25 evidence already. I want to make sure that Ms. Voycheske

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1 has a chance to see them. Defendant's exhibit 31?

2 THE COURT: Not in evidence yet.

3 MR. EIDELMAN: I will move its admission.

4 (Defense Exhibit 31 received in evidence.)

5 Q Are you familiar with Defendant's exhibit 31, the U.S.
6 Americans with Disabilities Act policy of First Data?

7 A Yes, I am.

8 Q What is the reason for this policy?

9 A It is to provide reasonable accommodations to qualified
10 but disabled associates who need an accommodation to perform
11 their essential functions.

12 Q This policy is similar to the one that I showed you
13 before, Defendant's 30, but more specific to the Americans
14 with Disabilities Act?

15 A It's more elaborate, yes.

16 Q Showing you what is marked Defendant's exhibit 32,
17 which I believe this one is in evidence -- it is not in
18 evidence. I will move this one into evidence, judge.

19 THE COURT: Exhibit 32?

20 MR. EIDELMAN: Yes, sir.

21 THE COURT: Go ahead.

22 (Defense Exhibit 32 received in evidence.)

23 Q Defendant's exhibit 32, Ms. Voycheske, are you familiar
24 with the U.S. Family and Medical Leave Act policy?

25 A I am.

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1 Q Is this a policy that you're responsible for
2 administering?

3 A Yes.

4 Q And what is your understanding, I know you're not a
5 lawyer, what is your understanding of the Family Medical
6 Leave Act and what it provides?

7 A It provides job protection to qualified individuals
8 with a serious health condition.

9 Q When an individual goes out on leave, what is the
10 process that the human resources services center is involved
11 in, in terms of providing assistance to individuals on
12 leave? What do you do?

13 A We collect necessary information to initiate the claim.
14 Then we mail them the necessary paperwork that them and the
15 treating physician needs to fill out. Give them a due date
16 to return it back to us. Once we have that information, we
17 evaluate to make ensure it meets the criteria for a leave of
18 absence. If it does, we issue them an approval. Let the
19 manager know of the approval. And they are protected to be
20 out on leave for that duration of time.

21 MR. EIDELMAN: Your Honor, move the admission of
22 D123.

23 THE COURT: D123?

24 MR. EIDELMAN: Yes.

25 THE COURT: How many more exhibits do you want to

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1 put into evidence?

2 MR. EIDELMAN: Just a couple after this, Judge,
3 very fast.

4 THE COURT: Why don't you put them in now?

5 MR. EIDELMAN: D123.

6 THE COURT: What else?

7 (Defense Exhibit 123 received in evidence.)

8 MR. EIDELMAN: D154 is in evidence already, I
9 believe.

10 THE COURT: Yes, go ahead.

11 MR. EIDELMAN: D157 is in evidence.

12 THE COURT: D157 is not in evidence. You want to
13 put it in evidence?

14 MR. EIDELMAN: D157 into evidence, please.

15 THE COURT: No objection. So I'll allow it. Go
16 ahead.

17 (Defense Exhibit 157 received in evidence.)

18 MR. EIDELMAN: D193 I believe is in evidence.

19 THE COURT: Yes, it is.

20 MR. EIDELMAN: D191.

21 THE COURT: You want that in evidence?

22 MR. EIDELMAN: Yes, please. Then D188.

23 (Defense Exhibit 191 received in evidence.)

24 (Defense Exhibit 188 received in evidence.)

25 THE COURT: That's in evidence.

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1 MR. EIDELMAN: Thank you, Judge.

2 BY MR. EIDELMAN:

3 Q Ms. Voycheske, I want to turn back to D123, which has
4 an unsigned cover letter from Mr. Marino, that's not what I
5 want to ask you about. You testified that there is a
6 package of information that individuals who are going to go
7 out on leave receive. Can you identify, I know it's not the
8 full screen -- let me do this for everybody, if I can. Is
9 this a one of the blank forms that is sent to individuals,
10 one of the forms that your team will send out as part of
11 leave administration?

12 A Yes, it is.

13 Q That's a form, a blank form, from MetLife for what
14 purpose?

15 A A medical release. The associate signs it to release
16 MetLife to reach out to their physician to get medical
17 information.

18 Q We've seen the completed one of these already, D154.
19 Is this the blank certification of health care provider for
20 Family Medical Leave Act that complies with the Department
21 of Labor regulations?

22 A Yes, it is.

23 Q What is this form, Ms. Voycheske?

24 A This is our associate's responsibility as well as leave
25 of absence. They complete this to declare what type of

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1 leave they are requesting, that they do plan to return to
2 work upon completion. And there is some basic provisions
3 and terms of conditions that they need to read and agree to
4 and sign.

5 Q And this is a blank form?

6 A This is page two of the same document that requires the
7 signature.

8 Q And this document, Ms. Voycheske?

9 A This is a release to return to work for those that are
10 out for their own medical condition. We require a
11 physician's release to allow them to return to work. This
12 just gives them a sample form to use.

13 Q Last but not least, what is this document?

14 A This is rights and responsibilities under the FMLA. So
15 it's overview of the entitlements that employees receive
16 under FMLA.

17 Q Defendant's exhibit 123, is that the standard packet of
18 forms that is sent to employees who go out on leave as
19 employees of First Data?

20 A For their own medical condition, yes.

21 Q Were you involved at all in processing the leave for
22 Steven Barger, the plaintiff if this matter?

23 A I was.

24 Q What was your role?

25 A I oversaw the leave from the time I became aware of it

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1 to its conclusion.

2 Q Showing you D154. Would that be standard for you to be
3 involved in a leave administration for an employee like
4 Mr. Barger?

5 A As a manager I don't typically handle them. But when
6 we wanted to give special attention to say a executive or a
7 higher level employee, then I will handle them, yes.

8 Q Were you working with anybody in HR in Atlanta,
9 Georgia, where Mr. Barger, where his office was, in
10 connection with the administration of his leave paperwork?

11 A I corresponded regularly with Rhonda Johnson.

12 Q Would it be unusual for you to work with a vice
13 president of human resources on leave administration?

14 A It's not something we do every day. We do it when we
15 want to ensure white-glove treatment for an employee.

16 Q Did you receive Defendant's exhibit 154, which was the
17 certification of health care provider filled out by
18 Dr. Baddour, Mr. Barger's doctor?

19 A I did.

20 Q The information that's on this form is completed by
21 Dr. Baddour or his office and not by people at First Data,
22 correct?

23 A Correct.

24 Q When you received this certification of health care
25 provider, Defendant's exhibit 154, what actions did you

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1 take?

2 A I reviewed the details within the form, medical facts,
3 how the questions are answered, to determine if it qualifies
4 as a leave of absence under the Family Medical Leave Act,
5 which this did. So I provided approval for the leave of
6 absence for the dates that the doctor indicated the
7 associate needed.

8 THE COURT: What date was that, September 2?

9 THE WITNESS: At this time what we had been
10 provided was October 22 as the first day of leave.

11 THE COURT: October 22?

12 THE WITNESS: Yes.

13 BY MR. EIDELMAN:

14 Q Was that the ordinary course of your job duties as the
15 manager of the human resources services center to receive
16 information like this, a certification of health care
17 provider, and make a determination whether or not somebody
18 was qualified to be on Family Medical Leave Act?

19 A Yes.

20 Q You do this every day and you've done this every day
21 for the last five, six, seven years, correct?

22 A Absolutely, yes.

23 Q As a result of -- what was the determination -- what
24 was the reason why you determined that Mr. Barger had
25 qualified with a serious health condition, that you just

VOYCHESKE - DIRECT - EIDELMAN

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1 told the Judge, as of October 22?

2 A The physician is asked for the beginning and end dates
3 of patient incapacity, and the physician indicated 10/22 as
4 the first date of incapacity.

5 Q Does the document that you have presented to the
6 physician that the physician fills out, indicate what it
7 means to be incapacitated on the certification form that was
8 completed by Mr. Barger's doctor?

9 A Are you asking if incapacity is defined?

10 Q Yes. Is it?

11 A Yes, it is defined directly underneath in italics.

12 Q The jury can see that; you don't have to read that.

13 THE COURT: So the first day of his leave,
14 according to the doctor, is October 22.

15 THE WITNESS: At this time according to what we
16 knew it was 10/22 of '16.

17 THE COURT: He was not on leave before, was he?

18 THE WITNESS: At this time I was not aware that he
19 was.

20 BY MR. EIDELMAN:

21 Q Speaking of that, did you know Mr. Barger before Rhonda
22 Johnson contacted you to assist with the paperwork for him?

23 A No, I did not.

24 Q Did you know that Mr. Barger had surgery in September?

25 A No.

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1 Q After receiving the certification of health care
2 provider from Dr. Baddour for Mr. Barger, what was the next
3 step that you took in connection with the administration of
4 Mr. Barger's leave?

5 A I issued him an approval letter for the leave of
6 absence.

7 Q D157, this is the approval letter that you issued to
8 Mr. Barger?

9 A Yes.

10 Q It indicates, it says, it indicates, that the leave
11 start date is 10/24/2016, why would it be that date?

12 A That was a Monday. I believe 10/22 and 23 were
13 Saturday and Sunday.

14 Q Did you send this to Mr. Barger?

15 A I did.

16 Q How did you send it to him?

17 A Postal mail.

18 THE COURT: Let me ask you this question. So the
19 first official date of his leave was October 22 or was it
20 October 24?

21 THE WITNESS: His date of incapacity was 10/22.
22 His day of actual work was, actual work, was 10/24. We
23 approved October 24.

24 THE COURT: Under the Family Medical Leave Act
25 when would the 90 days expire?

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1 THE WITNESS: I indicated in this letter, expires
2 on 1/16 the following year.

3 THE COURT: January 16.

4 THE WITNESS: Yes.

5 BY MR. EIDELMAN:

6 Q At some point in time, Ms. Voycheske, was an adjustment
7 made to the period of it Mr. Barger's FLA leave?

8 A Yes.

9 Q How did that come about?

10 A In an e-mail exchange with Mr. Barger. He indicated
11 that he went stopped working approximately 9/4.

12 Q What how did you get that information from Mr. Barger?

13 A I asked him when did he stop working.

14 Q Let me show you Defendant's exhibit 193. And let me
15 start at the bottom, can you see that, Ms. Voycheske?

16 A Yes.

17 Q And there is an e-mail from you to Mr. Barger on
18 January 5, 2017, so this is after New Years?

19 A Yes.

20 Q And it says, 'Our records from your physician indicate
21 you didn't start missing work until 10/22/2016. When did
22 you start missing work?'

23 Before I do that, let me turn back over, I apologize I
24 jumped ahead.

25 Earlier on the 5th you wrote an e-mail to Marilyn and

VOYCHESKE - DIRECT - EIDELMAN

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1 Steve. Do you know who Marilyn was?

2 A Yes.

3 Q What was Marilyn?

4 A It was Steve's spouse.

5 Q Had you been communicating with Mr. And Mrs. Barger in
6 connection with trying to assist them with their leave
7 paperwork?

8 A I had.

9 Q On January 5 why did you reach out to them?

10 A I reached out to them as a courtesy because we had not
11 yet received short-term disability approval. I wanted to
12 make him aware that if we didn't receive that, he would have
13 pay impact.

14 Q You were here in the courtroom a little while ago when
15 Mr. Barger said he doesn't whether or not he spoke to anyone
16 to MetLife about the leave date.

17 If you go up above the line where you just read from
18 your e-mail, it appears to me there is an e-mail from Steven
19 Barger to you, Jennifer Voycheske, copying what I think
20 might be his wife's e-mail. And it says, this is from
21 Mr. Barger to you, 'Ruth called and said she approved pay
22 from 9/4 until 10/15. She's awaiting for additional info
23 from doctor to extend payment to 12/13.'

24 Do you see that?

25 A Yes.

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1 Q Do you know who Ruth is?

2 A I believe the claim manager at MetLife.

3 Q In response to this e-mail from Mr. Barger where he
4 tells you that MetLife who administers short-term disability
5 had indicated they approved shorts term disability from 9/4,
6 what steps did you take -- or did this surprise you?

7 A It caught me off guard, yes.

8 Q Why?

9 A Because from everything that we received up to this
10 point we believed he had not stopped missing work prior to
11 10/22.

12 Q What is -- I know that -- does First Data administer
13 its own short- and long-term disability programs?

14 A All we do is pay it. MetLife evaluates and approves
15 it.

16 Q What does it mean to be approved on short term or long
17 term disability? Does it mean that according to the terms
18 of plan, MetLife has determined that you're disabled as of
19 that point in time?

20 A Yes.

21 Q In response to Mr. Barger telling you that MetLife had
22 approved his leave as of 9/4, this is when you sent to him,
23 that same day on January 5, 'Our records from your physician
24 indicate you didn't start missing work until 10/22/2016.'
25 That's referring to the certification of health care

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1 provider that we had seen earlier, correct?

2 A Correct.

3 Q 'When did you start missing work,' that's the question
4 that you asked him, those words, 'When did you start missing
5 work,' correct?

6 A Yes.

7 Q Now he responds back to you, but he really doesn't
8 answer the question, right?

9 A Right.

10 Q So then you ask him again. 'Thanks, Steve. Can you
11 clarify when you stopped working? Was it on 9/4/16 or
12 10/22/16?' And how does he respond?

13 A He responds by saying '9/4, my operation was 9/6.'

14 Q You understood that to mean that Mr. Barger telling you
15 in response to your question when did he stop working that
16 he had stopped working on 9/4?

17 A Correct.

18 Q Did you take any action after Mr. Barger advised you
19 that he had stopped working on 9/4?

20 A I did. I went to the MetLife disability site, based on
21 his statement that they had approved him beginning that
22 date. We have access to Met Links portal that shows all
23 approvals of disability claims. I looked at Mr. Barger's
24 claim and confirmed they did indeed approve it for a date of
25 disability of 9/4.

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1 Q I want to show you Defendant's exhibit 191, the second
2 page of it, do you see that?

3 A Yes.

4 Q Is this the MetLife portal that you looked at?

5 A Yes.

6 Q This is the MetLife portal that you looked at after
7 Mr. Barger told that you he stopped working on 9/4?

8 A Yes.

9 Q What did the MetLife portal tell you?

10 A The MetLife portal told me that his date of disability
11 had been determined to be September 4, that what his
12 benefits start date was, what had been approved through, and
13 what his maximum duration was.

14 Q I see there is a circle around 9/4/2016. Was that on
15 the MetLife portal?

16 A I circled that as part of preparation for this trial.

17 Q After confirming that what Mr. Barger had told you was
18 accurate, that MetLife had confirmed that his date of
19 disability for short-term disability purposes was 9/4, what
20 actions did you take?

21 A Based on the fact that MetLife does extensive medical
22 research, we rely on their dates if we're unable to obtain
23 additional data through our own means. I took that 9/4 date
24 as a medically informed begin date, and I retroactively
25 approved his FMLA to that date.

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1 Q Do the FMLA regulations allow an employer to do that
2 when it receives new information about an employee's
3 beginning of their start date under the FMLA?

4 A Absolutely.

5 MR. SHEARER: Objection.

6 THE COURT: You had knowledge.

7 Q After confirming with MetLife the information that
8 Mr. Barger told you was accurate, what steps did you take?
9 Did you notify Mr. Barger?

10 A I retroactively approved his leave to the 9/4 date. I
11 mailed him a letter, as I had previously, this was
12 readvised.

13 Q This is Defendant's exhibit 188. Is this the revised
14 FMLA date letter that you sent Mr. Barger on January 5,
15 2017?

16 A Yes, it is.

17 Q What was the purpose of sending Mr. Barger this letter?

18 A To let him know that his approval for FMLA had been
19 pushed backwards to be effective beginning 9/5. And that
20 his exhaustion of FMLA had changed to November 28. But we
21 were continuing evaluation of his leave of absence. And we
22 were requesting the additional time under the business unit
23 under the ADA.

24 Q So after the FMLA would be expired, Mr. Barger would
25 then have eligibility to be covered by First Data's policy

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1 with respect to allowing employees to stay out on additional
2 leave under the Americans with Disabilities Act?

3 A Yes.

4 Q Is that standard practice and procedure for First Data?

5 A We do it for every employee out on medically leave who
6 is unable to return on the conclusion of FMLA. We consider
7 their additional time under the ADA, yes.

8 MR. EIDELMAN: If I may consult with my
9 colleagues?

10 THE COURT: Go ahead.

11 MR. EIDELMAN: No further questions of
12 Ms. Voycheske.

13 THE COURT: Anything else, Ms. Shearer?

14 MR. SHEARER: Yes, I have quite a bit.

15 THE COURT: Let me ask a question. The FMLA
16 expired November 28, you continued it for two weeks after
17 that?

18 THE WITNESS: We continued it. We were prepared
19 to continue it for the long as business was able to
20 accommodate him being out.

21 THE COURT: About how long is that?

22 THE WITNESS: Well --

23 THE COURT: It's an indefinite period of time?

24 THE WITNESS: It can go on for quite a while.

25 THE COURT: I'm confused about that. A person can

VOYCHESKE - DIRECT - EIDELMAN

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1 be considered to be on leave for an indeterminate period of
2 time not just --

3 THE WITNESS: There is generally a time period
4 where it would be an undue hardship to the business.

5 THE COURT: That's just your practice. Under the
6 Act, November 28 was the date of the end of the entitlement.

7 THE WITNESS: Under the FMLA.

8 THE COURT: What was the date of his termination
9 from employment, do you know?

10 THE WITNESS: I don't remember offhand. I know he
11 provided a release to return on the tenth. I'm not quite
12 sure. I wasn't involved in the termination.

13 THE COURT: What was the date of termination?

14 MR. SHEARER: Notified on January 13.

15 THE COURT: January 13 he was notified.

16 MR. SHEARER: It was --

17 MR. EIDELMAN: It was effective through
18 February 28, 2017.

19 THE COURT: The notification was January 13 that
20 he was not welcomed to come back, I guess, right, and
21 effective February?

22 MR. EIDELMAN: Twenty-eight.

23 THE COURT: So February 28 is the actual official
24 termination date I take it.

25 MR. EIDELMAN: His last date of employment, yes,

VOYCHESKE - CROSS - SHEARER

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1 sir.

2 CROSS-EXAMINATION

3 BY MR. SHEARER:

4 Q Ms. Voycheske, what do you define as a leave? What is
5 leave?

6 A I define leave is what is designated under the Family
7 Medical Leave Act, which basically states an employee or
8 qualifying family member must have a serious health
9 condition in which the associate, if it's our employee, is
10 unable to work, or that qualifying family member is unable
11 to work, thus our associate needs to care for them.

12 Q So somebody has to be not working in order to be on
13 leave?

14 A That's the understanding, yes.

15 Q So if somebody is working, then they are not on leave;
16 is that correct?

17 A They are violating FMLA.

18 Q If somebody is going to work, they are not on leave?

19 A Correct.

20 Q I'm going to go to the last -- you went to the MetLife
21 portal, this Defendant's exhibit 193, I believe --
22 Defendant's exhibit 191. You just testified as to document.

23 When did you say you went and looked at this on the
24 MetLife portal?

25 A Immediately after I read Mr. Barger's e-mail that he

VOYCHESKE - CROSS - SHEARER

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1 stopped working on 9/4.

2 Q And so that was on January 5, correct?

3 A Yes.

4 Q Can you answer this question for me, right here it says
5 claim status closed January 18.

6 A Uh-huh.

7 Q How could you look at something with a closed status of
8 January 18 on January 5?

9 A This is a print screen that was pulled later. This a
10 print screen of the Met Link portal after the date that I
11 looked at it this. This is representing what the approval
12 was on the day I looked at. I didn't think to take a print
13 screen that day; we pulled it a few weeks later.

14 Q That closed status, I see some of these areas like this
15 one here edit, edit, but this one doesn't have that. These
16 are edits, does give First Data the ability to change the
17 information there?

18 A No. We have no -- we have view-only access to this
19 portal.

20 Q Has anyone ever asked the doctors if the employee has
21 been at work?

22 A We rely on the certification that says what the dates
23 of incapacity are. We don't call the doctors and verify
24 that they are not at work.

25 Q Do you have to be incapacitated to go on Family Medical

VOYCHESKE - CROSS - SHEARER

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1 Leave Act?

2 A Continuously, yes.

3 Q So a serious health condition is defined as an
4 incapacity, unable to work, normal conduct, unable to go to
5 school. You have to be -- that's a serious health
6 condition, only incapacities are serious health conditions?

7 A No, the form itself requires several questions to be
8 answered a certain way. It requires a medical diagnosis,
9 you have to evaluate the entire form to determine whether it
10 meets the criteria for a serious health condition, which is
11 what I did.

12 For example, prescription medication, overnight stay at
13 hospital, the condition itself would render you
14 incapacitated, multiple treatments, various things that need
15 to be considered and analyzed to consider the FMLA
16 designation.

17 Q So when did Mr. Barger sign his documents initially.

18 A I believe he signed his employee documents shortly
19 after he got them in November.

20 Q So if Mr. Barger was totally incapacitated on 10/24,
21 and his signatures are on 11/21. How you're asking him to
22 do that? He's capable of doing that.

23 A We ask all employees to do that?

24 Q I thought you were saying he's totally incapacitated?

25 A That doesn't necessarily mean he can't sign his name.

VOYCHESKE - CROSS - SHEARER

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1 Q Does that mean he can understand that documents?

2 A He shouldn't have signed them if he didn't understand
3 them.

4 Q When is the first time that you gave Mr. Barger his
5 notification of eligibility under the FMLA?

6 A Are you talking approval or his eligibility to apply?

7 Q Eligibility notice?

8 A I believe that packet was sent to him on November 17.

9 Q That's when you sent the rights and responsibilities
10 form as well?

11 A That's when that was sent to him, yes.

12 Q You have his leave ending seven days after he received
13 his notice of eligibility and notice of rights and
14 responsibilities?

15 A Retroactively that's how it ended up, yes.

16 Q How can -- you know the FMLA --

17 A I can explain it.

18 Q How can his leave be before the rights were
19 responsibilities were given to him?

20 A It wasn't. I can explain it if you like, it happens
21 every day.

22 Q No. Did anybody at First Data provide Mr. Barger's
23 doctor a description of his job?

24 A It's up to -- unless you are --

25 THE COURT: The question is whether anyone did?

VOYCHESKE - CROSS - SHEARER

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1 THE WITNESS: No, I do not.

2 Q How does the doctor know --

3 THE COURT: That's argument.

4 Q In the MetLife form that was shown, I believe I can put
5 it up here, the very first line under authorization to
6 disclose information about me. It says, MetLife integrate
7 the claim services for disability benefits and request under
8 the Family Medical Leave Act.

9 What does MetLife do under First Data's Family Medical
10 Leave Act practices?

11 A They do nothing. This is a template that they send to
12 all of their clients, which some they do manage FMLA. This
13 is a general form.

14 Q MetLife isn't involved in the FMLA process?

15 A Not for First Data, no.

16 Q Can you be on FMLA leave and not receive short-term
17 disability?

18 A Yes, you can.

19 Q Can you receive short-term and not be on FMLA leave?

20 A We try not to let that happen.

21 Q Why does the short-term disability date and the leave
22 date have to match?

23 A Because if the doctor is consistent in what he provides
24 to our organization and what he provides to MetLife, they
25 should be the same. The patient should be incapacitated on

VOYCHESKE - CROSS - SHEARER

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1 beginning and end date for both disability and leave of
2 absence.

3 Q But when did Mr. Barger apply for disability benefits?

4 A I believe it was a bit late in the process.

5 Q When was he approved for disability benefits?

6 A I don't believe until January.

7 Q But yet the short-term disability benefits were applied
8 all the way back to September 4?

9 A No. This is FMLA only, I'm not talking about
10 disability.

11 Q But you relied on MetLife's determination of when the
12 short-term disability started in order to make your
13 determination as to when the FMLA leave started?

14 A Yes.

15 Q Why does one have anything to do --

16 MR. EIDELMAN: Your Honor --

17 THE COURT: Sustained.

18 Q What does it take --

19 THE COURT: Sustained. You're argumentative.

20 Let me clarify, if the first day of his FMLA leave
21 started on September 4, assuming that's the case, then his
22 FMLA entitlements would end on November 28.

23 THE WITNESS: Right.

24 THE COURT: If it started on October 22 or
25 October 24, let's say October 22, then I think the last day

VOYCHESKE - CROSS - SHEARER

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1 was January 16.

2 THE WITNESS: Correct.

3 THE COURT: 2017.

4 THE WITNESS: Uh-huh.

5 THE COURT: And his termination date apparently is
6 February 28 and the notification indication of termination
7 was on January 13, right?

8 THE WITNESS: Uh-huh.

9 THE COURT: So am I correct that whether or not
10 the first day of leave started on October 22 or September 4,
11 his FMLA claims would have expired by at the outset
12 January 16.

13 THE WITNESS: Correct, yes.

14 THE COURT: So he would not be entitled to leave
15 under the FMLA after January 16.

16 THE WITNESS: Yes. He would have exhausted his 12
17 weeks. It's complex, yes, you're right, his 12 weeks have
18 exhausted.

19 THE COURT: You talk about the ADA, you continued
20 to provide benefits subsequent to the FMLA expiration date
21 as a matter of policy by your organization?

22 THE WITNESS: Yes.

23 THE COURT: That's not for FMLA purposes, that's
24 for ADA purposes.

25 THE WITNESS: Under the ADA.

VOYCHESKE - CROSS - SHEARER

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1 THE COURT: Which means, you would not terminate
2 somebody unless there is some lawful reason to do so.

3 THE WITNESS: Correct.

4 THE COURT: The job would be kept open, he could
5 come back under the ADA?

6 THE WITNESS: Yes.

7 THE COURT: Unless he was terminated for some
8 lawful reason.

9 THE WITNESS: Yes, for a reason that was --

10 THE COURT: It's confusing for me, maybe it's not
11 confusing for the jury, to understand the difference between
12 entitled to leave under the FMLA on the one hand and what
13 the policy is under the ADA.

14 THE WITNESS: The ADA isn't quite as black and
15 white as the FMLA.

16 THE COURT: The person would be entitled under the
17 ADA, he cannot be discharged unless for disability.

18 THE WITNESS: Not for his disability.

19 THE COURT: It would have to be for a lawful reason.

20 THE WITNESS: Correct.

21 THE COURT: I think I'm beginning to understand
22 it. I don't know whether you folks are beginning to lift
23 the clouds or not. I'm not telling you anything about how
24 the case should be decided, just trying to understand it in
25 terms of the dates and the FMLA. We'll be talking more

VOYCHESKE - CROSS - SHEARER

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1 about this when I give you the instructions on the law,
2 that's why it's taking me a little bit of time to get it all
3 together. You can see it's not so black and white. It's
4 not so easy to understand this. Hopefully you do have an
5 understanding now.

6 Anything else?

7 BY MR. SHEARER:

8 Q When the doctor's certification, the original one that
9 you looked at said 10/22, where does the doctor send that
10 form?

11 A To my leave management department.

12 Q To leave management department, that doesn't go to
13 MetLife?

14 A They may send it to MetLife. We're not privy to what
15 MetLife receives. I can't say if it was or wasn't.

16 Q Going to Plaintiff's Exhibit 48, this is already
17 entered. This bottom e-mail here, it's an e-mail, it says
18 to HR help desk and service center, is that for you?

19 A Neither of those are leave management. They are within
20 our department, but not to my team.

21 Q Mr. Barger asked what his last day of work was, this is
22 in December. And then --

23 THE COURT: Is there anything? Mr. Shearer, you
24 have thousands of documents in evidence here the jury can
25 paper the walls with.

VOYCHESKE - CROSS - SHEARER

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1 Aside from that, are there any other facts?

2 MR. SHEARER: Yes.

3 THE COURT: Do it now. I promised the jurors 4:30
4 and we have somebody else that is here. How long will that
5 witness take?

6 MR. EIDELMAN: Your Honor, I'll do it as quickly
7 as Ms. Voycheske, I think about ten minutes.

8 THE COURT: Ask one or two more questions,
9 Mr. Shearer. I think you exhausted her testimony.

10 BY MR. SHEARER:

11 Q So this exhibit Plaintiff's Exhibit 49 I don't think --
12 the manager has to verify an employee's last day of work; is
13 that correct?

14 A Generally the employee should verify their last day of
15 work. It's odd that they wouldn't know what their last day
16 of work is; if they do not, we rely on the manager to do
17 that.

18 Q Why did you -- but the doctor provided it to you, is
19 that what you're saying?

20 A Well, MetLife is who reached to Steve, not our team.

21 Q You relied on --

22 THE COURT: We have the facts. Any other
23 questions? Save your argument for summations.

24 MR. SHEARER: Yes, I do.

25 THE COURT: What else do you need to know from

VOYCHESKE - CROSS - SHEARER

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1 this witness, factually?

2 Q Could it have been construed when you asked Mr. Barger
3 what his last day working was that he thought that was the
4 last day he was in the office?

5 THE COURT: Anything is possible. Next question.

6 MR. SHEARER: Your Honor, I would like to enter
7 some documents. I don't necessarily need to talk about
8 them, but are related to --

9 THE COURT: Do you think you need more documents?

10 MR. SHEARER: I think they are important.

11 THE COURT: You want more documents? You have
12 more questions of this witness?

13 MR. SHEARER: I need Exhibit 40, 45 and 52, 53.

14 THE COURT: Fifty-two is in evidence already.

15 Let's take care of that after Ms. Voycheske
16 leaves.

17 We want to accommodate this person they came a
18 long distance to testify. We have 45 minutes left to do
19 that. Thank you very much. Next witness.

20 (Whereupon, the witness was excused.)

21 MR. EIDELMAN: We call Justin Stamey.

22 COURTROOM DEPUTY: Take the witness stand. Remain
23 standing assistant raise your right hand.

24 (Witness takes the witness stand.)

25 JUSTIN STAMEY, called as a witness, having

STAMEY - DIRECT - EIDELMAN

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1 been first duly sworn/affirmed, was examined and testified as
2 follows:

3 THE WITNESS: Yes.

4 COURTROOM DEPUTY: Have a seat. State your name
5 for the record.

6 THE WITNESS: Justin, J-U-S-T-I-N, Stamey,
7 S-T-A-M-E-Y.

8 COURTROOM DEPUTY: Thank you.

9 DIRECT EXAMINATION

10 BY MR. EIDELMAN:

11 Q Good afternoon, Mr. Stamey. Thank you for coming from
12 Atlanta today to join us here. By whom are you employed?

13 A Fiserv.

14 Q You got it, right. What is your title?

15 A Director of training.

16 Q When did you start working at First Data or Fiserv?

17 A July 2009.

18 Q Were you hired by Steven Barger?

19 A No.

20 Q Quickly, just get to what you were hired at and how you
21 got to the sales training group?

22 A Sure. Spent a couple of years in sales, then moved to
23 training role for about a year. Then I moved into a sales
24 manager role for two years. And then into my current
25 position, which was under Steven Barger at July 2015.

STAMEY - DIRECT - EIDELMAN

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1 Q So you've been a director at First Data since July 2015
2 to present?

3 A Yes.

4 (Continued on next page.)

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STAMEY - DIRECT - EIDELMAN

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1 BY MR. EIDELMAN:

2 Q You just said you came to work under Steve Barger. Was
3 he already the senior vice president in charge of sales
4 training at the time you joined that organization?

5 A Yes, he was.

6 Q As a director, what were your duties and responsibilities
7 then?

8 A To take in requests from business leaders, analyze the
9 request, design, develop, and then deliver training.

10 Q We heard testimony yesterday from Julie Kelly that while
11 Mr. Barger was the manager of the sales training department,
12 that he was responsive, effective, and available, as the
13 manager of that group. Do you agree with that testimony?

14 A When I was first hired, yes.

15 Q Did that change?

16 A It did change over time.

17 Q What happened?

18 A I think in the middle of 2016, you know, somewhere in
19 July, somewhere around that time, it was harder to reach
20 Steve. After the surgery, I think that was the hardest part.

21 Q The surgery that took place in September?

22 A September, yes.

23 Q Okay. Did you have an opportunity to interact with
24 Mr. Barger while he was on leave following his surgery?

25 A I did.

1 Q What was the nature of those interactions?

2 A Really just -- number one, to check on him personally,
3 because we had a personal relationship. He was my boss. I
4 wanted to make sure he was doing okay. And, you know, we
5 wanted to stay connected. I testified, like you heard
6 earlier, so we would try and make sure that he had, a laptop
7 or something set up so that he could stay connected.

8 Q Did you consider him to be working during that time
9 period?

10 A Not to the degree that he was before the surgery.

11 Q Right.

12 So how often did you interact with him while he
13 was -- prior to his surgery?

14 A Prior to the surgery, probably, you know, once a day. He
15 was in the office, you know, we'd stop by in the morning,
16 talk.

17 Q Prior to the surgery, was there anyone else involved in
18 running the leave group besides Mr. Barger?

19 A Prior to the surgery?

20 Q The sales training group. Was Rhonda Johnson involved?
21 Was she somebody that you worked with in terms of when you
22 were an employee of the leave -- not the leave group. Excuse
23 me, in the sales training group?

24 A Yes. She was our HR partner, so we would go to Rhonda if
25 we needed help around a sensitive situation. That's typically

1 what the HR people do.

2 Q Do you also talk to Rhonda Johnson about difficulties
3 that were being encountered because Mr. Barger was unavailable
4 to help lead the group?

5 A Yes.

6 Q Okay. And that happened quite often?

7 A Yes.

8 Q And that happened prior to the time that Mr. Barger had
9 surgery?

10 A Again, not as frequently before he had surgery, it was
11 more after the surgery.

12 Q Okay. There was testimony yesterday about a conversation
13 between you, Rhonda Johnson, and Julie Kelly that was on or
14 about November 10 of 2017 -- '16, excuse me, because there
15 were concerns about Mr. Barger and his accessibility and
16 availability. Are you familiar with that conversation?

17 A It sounds familiar. We had a conversation with Rhonda
18 around that time, so, yes.

19 Q What were those conversations with Rhonda at that time?

20 A Well, at that time of year, it's typically budget
21 planning, there's head count considerations, there are
22 planning for the next year. So we were trying to essentially
23 package information that could be put in front of Steve or
24 Jeff Hack or someone that can make a decision on what we
25 needed to do with our strategy going forward.

1 Q Were you having trouble connecting with Mr. Barger during
2 that time period?

3 A Yes.

4 Q Okay. And that's why you -- was it just you that went to
5 Ms. Johnson or were there other people as well?

6 A There were others. Theresa Ward, I know -- well, Julie,
7 as well, Julie Kelly.

8 Q Okay. While you were -- while Mr. Barger was managing
9 the department, there were a number of products, I think, that
10 were brought in to be used for working with the sales training
11 group; is that right?

12 A When you say products?

13 Q Products. Have you heard of something called a business
14 needs analysis?

15 A Yes.

16 Q What was the business needs analysis?

17 A So, in short, it was essentially a software program,
18 essentially ten questions -- let me ask you ten questions
19 about your business, and then it would provide a
20 recommendation with a bundled solution that you could then
21 present to that client.

22 Q Is First Data using business needs analysis now?

23 A No.

24 Q When did it stop using it?

25 A Probably late 2017, early 2018.

1 Q Why did it stop using it?

2 A Mainly low utilization. It was costly to deploy and
3 then, of course, costly to maintain. You had to update the
4 recommendations based on the products that were changing, and
5 it wasn't being used as much in the field.

6 Q When you say it was costly, do you have a sense of the
7 cost for the business needs analysis software that Mr. Barger
8 brought to the company?

9 A Based on all of the development that was done with the
10 external vendor, it had to be north of 2 million.

11 Q And this was done at First Data, right? This is First
12 Data developed the business needs analysis, correct?

13 A So First Data developed the connections on the back end.
14 It is based out of the CRM tool, but then there was another
15 company that was writing some of the app architecture and what
16 it needed to essentially function on the iPad.

17 Q Right.

18 During his employment as the manager of that group,
19 did you also turn to an external learning company to help the
20 sales training group deliver sales training to employees?

21 A To employees?

22 Q Or to sales folks, something called the Richardson?

23 A Oh, yes. So Richardson was a sales skills methodology
24 company. They were a vendor, companies will bring them in to
25 look -- rolling out new sales skills training. So we did work

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1 with the Richardson, yes.

2 Q Does First Data still work with Richardson?

3 A No.

4 Q When did it stop working with Richardson?

5 A We were able to get rid of that contract in March of
6 2018.

7 Q March of 2018?

8 A Uh-huh.

9 Q What was -- how much was that contract costing First
10 Data?

11 A Total, 1.3 million over three years.

12 Q Why did First Data cancel the contract with Richardson?

13 A Mostly the cost initiative.

14 Q Did you need the services that were provided by
15 Richardson or these things that you could do internally at
16 First Data?

17 A We could do it internally.

18 THE COURT: But you were there while this was
19 happening, right?

20 THE WITNESS: The agreement preceded me.

21 THE COURT: This is afterwards, you came, and you
22 cut costs, and you didn't need it anymore?

23 THE WITNESS: Correct.

24 THE COURT: We are getting a little tangential.

25 Let's go on. Do you need him anymore? Because he may have to

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1 stay here until Monday.

2 MR. EIDELMAN: Your Honor, it is going to be very,
3 very brief.

4 THE COURT: I am not going to truncate Mr. Shearer's
5 questioning.

6 MR. EIDELMAN: I am not trying to, Judge.

7 THE COURT: I am telling you right now.

8 MR. EIDELMAN: Okay. If I may then.

9 THE COURT: This is not the heart of your case.

10 MR. EIDELMAN: Can I ask him what his current
11 position is, please.

12 THE COURT: Go ahead.

13 Q What is your current position?

14 A I'm director of training.

15 Q And who leads the sales training group at First Data now,
16 Fiserv?

17 A I do.

18 THE COURT: You were working -- you were not -- you
19 were working underneath Mr. Barger's supervision, weren't you?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: Do you have any problems with the way he
22 did his job? You had a close relationship?

23 THE WITNESS: We had a close relationship.

24 THE COURT: Came to work every day, worked really
25 hard?

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1 THE WITNESS: Yes.

2 THE COURT: You were all trying to do the best you
3 can to make a lot of money for First Data, right?

4 THE WITNESS: Yes, sir.

5 THE COURT: Do you have any other questions?

6 MR. EIDELMAN: I do.

7 Q Were you employed by First Data when Robin Ordung took
8 over as interim lead -- interim manager or lead of the sales
9 training group?

10 A Yes.

11 Q When did that occur?

12 A Early 2017.

13 Q What was the difference between Mr. Barger's management
14 style and Ms. Ordung's management style --

15 THE COURT: Objection sustained. I don't think
16 it's -- I think we're getting a little far afield. Maybe it's
17 tangentially relevant on some theory, but let's move on.

18 MR. EIDELMAN: I will move on.

19 Can I have the Elmo, please.

20 Q Mr. Stamey, are you familiar with this organizational
21 chart?

22 A Yes.

23 Q This is Defense Exhibit 182.

24 Is this the organizational chart that existed at the
25 time that Steve Barger went out on leave and Ms. Ordung took

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1 over?

2 THE COURT: There was already testimony about this.

3 MR. EIDELMAN: I know.

4 THE COURT: We don't need it. It is duplicative.

5 It is getting cumulative. We have tons of exhibits.

6 MR. EIDELMAN: Can I just ask him a question, Judge?

7 THE COURT: One last question.

8 MR. EIDELMAN: One last question.

9 THE COURT: Go ahead.

10 Q Mr. Stamey, at my request, did you mark the -- let me ask
11 this question.

12 How many employees are currently in the sales
13 training group, including yourself?

14 THE COURT: I don't think we need it. Next
15 question.

16 Q Mr. Stamey, at my request, did you mark the sales -- the
17 organizational chart to indicate what the sales training group
18 looked like now versus what it looked like at the time that
19 the company determined --

20 THE COURT: I think we're getting a little bit
21 collateral, tangential, and I think it's getting a little bit
22 confusing and prolix. We don't need it.

23 Do you have any other questions of this witness?

24 MR. DiLORENZO: Your Honor, can we make an offer of
25 proof?

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1 THE COURT: No, you can take it up to the Circuit
2 Court.

3 Do you have anything else?

4 MR. DiLORENZO: Your Honor, can I be heard on this
5 objection, please.

6 THE COURT: No.

7 You have any other questions of this witness?

8 MR. EIDELMAN: May I just consult with my colleague
9 for one second, Your Honor?

10 THE COURT: You can ask one or two more questions,
11 and then we're going to move on.

12 MR. EIDELMAN: Well, the only last question I have
13 would be, what does the organizational chart look like now.
14 And I asked him to mark it, what it looked like now versus
15 what it looked like then.

16 THE COURT: You know, look. It may be on some sort
17 of theory relevant to your case. You have 700 exhibits in
18 evidence already. You are overwhelming the jurors. There
19 comes a time when I think as the judge that it is getting a
20 little bit too complicated and prolix, and I think we have had
21 enough, okay? That's my ruling. You can step down.

22 Do you have any questions to ask of him?

23 MR. SHEARER: Just one.

24 THE COURT: You can stay, if you need to have him
25 come back on Monday, I am going to tell the jury you are

1 perfectly entitled to do that.

2 MR. SHEARER: No, no. I just have one question.

3 CROSS-EXAMINATION

4 BY MR. SHEARER:

5 Q You talked about the business needs analysis and the
6 external learning company.

7 Do you have any personal knowledge that Mr. Barger
8 was the one that implemented these?

9 A Yes.

10 Q Do you have any personal knowledge that Mr. Plumeri
11 implemented these?

12 A No.

13 MR. SHEARER: That's it.

14 THE COURT: You may step down.

15 (WHEREUPON, the witness was excused.)

16 THE COURT: All right. Now, it is 4:00. We have
17 any more live witnesses today?

18 MR. SHEARER: No, Your Honor.

19 THE COURT: Does the defendant have any live
20 witnesses today to present?

21 MR. EIDELMAN: We let Mr. Shearer put them on.

22 THE COURT: Okay. I'm just asking.

23 What I am trying to do, I'm not trying to play games
24 with you folks, okay. You've got this thing litigated up to
25 the eyeballs. We understand it. But there comes a point in

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1 time when I think it's getting a little prolix and I have to
2 control the case, all right?

3 You have some deposition testimony you want to read
4 in yet?

5 MR. SHEARER: Yes, I do.

6 THE COURT: All right. And I think if you do that,
7 how long will it be? Because we are going to leave at 4:30.
8 Can you do it by 4:30?

9 MR. SHEARER: I think so. I hope so.

10 THE COURT: If it is not terribly relevant, I am
11 going to make the same rulings with respect to your offerings
12 as I did with the defendants.

13 What is it all about?

14 MR. SHEARER: The first one I want to do is Kathi
15 Benhardt, who is the head of the spreadsheets that we were
16 looking at on Mr. Barger being added. She's the one that
17 plans the reductions in force.

18 THE COURT: How long will that take?

19 MR. EIDELMAN: Your Honor, that's a
20 mischaracterization. She does not plan the reductions in
21 force.

22 THE COURT: I don't know. I haven't heard a thing.

23 MR. EIDELMAN: She does the reporting.

24 THE COURT: I just want to know how long will that
25 deposition testimony be? I'm trying to conclude this trial

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1 today. If I can't do it, I can't do it.

2 MR. SHEARER: Can I get it into a half hour? I
3 don't know.

4 THE COURT: Here's what we are going to do. Members
5 of the jury, we have had a long week. You are free to go home
6 now. Don't talk about the case.

7 We are going to have to talk to the lawyers about a
8 few things in your absence, sort of get the real issues
9 refined so we can present it to you in a way that you
10 understand, hopefully. That's my job. We have had a lot of
11 exhibits, we have had a lot of testimony, about a lot of
12 operations of First Data. It has been all very educational.
13 I'll pull it all together for you in my charge. In the
14 meantime, maybe Monday morning, there may be another hour of
15 depositions or whatever else, all right? But for sure, after
16 that, we will have probably summations, and we will see how we
17 go.

18 But rather than put everybody under undue pressure
19 today, now, I think it is a good time for us to end our
20 proceedings for the week.

21 Juror number 6, drive carefully to where you are
22 going, okay.

23 And we will see you all on Monday morning at 10:00.

24 THE COURTROOM DEPUTY: All rise.

25 (WHEREUPON, at 4:01 p.m., the jury exited the

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1 courtroom.)

2 (Proceedings continue in open court; no jury
3 present.)

4 THE COURT: All right. The jurors are not here. We
5 are going to take a 15-minute break and then continue.

6 But I want to ask once again, Mr. Shearer, I think
7 you said the first day of leave was when? November? You gave
8 me a date before?

9 MR. SHEARER: They came in --

10 THE COURT: When do you claim he was on leave, if at
11 all?

12 MR. SHEARER: He started leave, November 21.

13 THE COURT: That's the date that you claim leave
14 started?

15 MR. SHEARER: Right.

16 THE COURT: You concede he was on leave November 21?

17 MR. SHEARER: Yes, he was. I am not contesting that
18 October 24 start date that was in the designation letter,
19 because it doesn't affect Mr. Barger's rights at the end of
20 leave. Because he would -- he asked to be returned. So I am
21 not contesting --

22 THE COURT: Just one second.

23 So you claim that -- I have to give the jury some
24 dates here, that we agreed to. November 21 is when you claim
25 that he was lawfully on leave, right?

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1 MR. SHEARER: Yes.

2 THE COURT: Okay.

3 MR. SHEARER: And like I am saying, Your Honor, you
4 can use the October 24 date --

5 THE COURT: Just one second.

6 So October 24 or 22 is the day of first leave,
7 according to what we just heard, right? And you say it is
8 okay whether it's October 24 or 22 or November 1.

9 MR. SHEARER: Right.

10 THE COURT: So if it is October 22, the -- his FMLA
11 date ended on January 16.

12 MR. SHEARER: Correct.

13 THE COURT: Now, your position is that he wanted to
14 come back to work before that, right?

15 MR. SHEARER: He scheduled January 17 to come back
16 to work.

17 THE COURT: Right.

18 So on January 7, he wanted to come back. He still
19 had some time left on his leave, right?

20 MR. SHEARER: Correct.

21 THE COURT: And that's what you say is the basis for
22 your claim, I guess, under the FMLA?

23 MR. SHEARER: Right.

24 THE COURT: Okay. So I just want to get it
25 straight. It is not easy for me, you know. You've got so

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1 many exhibits. And it is fun, you can try the case whatever
2 way you want, but if you want to give this jury 340 exhibits,
3 good luck. But you got them all in evidence. The defendant
4 as well. Sometimes cases are overtried.

5 MR. SHEARER: It's hard to prove when you are on
6 leave and not there. That's --

7 THE COURT: All right. 4:15, we will continue our
8 conversation.

9 (WHEREUPON, a recess was had from 4:03 p.m. to 4:21
10 p.m.)

11 THE COURT: Let's go back on the record.

12 So, Mr. Eidelman, the defendant's position is that
13 there's no FMLA problem because his leave started on September
14 4. Is that your position?

15 MR. EIDELMAN: One of them, Judge.

16 THE COURT: Well, that is our principal one, to
17 start.

18 October 22, I think you said, is the first day of
19 his leave, right?

20 MR. EIDELMAN: No, we said, actually, Your Honor,
21 the earlier, when we were here earlier, before lunch, we said
22 the first day of the leave was in September. And that's --

23 THE COURT: Fine.

24 MR. EIDELMAN: And that's what we said.

25 THE COURT: And that's your position.

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1 Now, October 22, what happened then?

2 MR. EIDELMAN: On October 22, that was the first --
3 that was the initial time that we got the doctor's
4 certification saying -- and then, based on additional
5 information that came from the plaintiff, the leave management
6 office, Ms. Voycheske testified --

7 THE COURT: You don't have to do that. Your
8 position is that he was lawfully on leave as of October 22,
9 one way or the other? Yes or no?

10 MR. EIDELMAN: Yes.

11 THE COURT: Okay. So if he was lawfully on leave on
12 October 22, that means his leave, 12 weeks period under the
13 FMLA, expired January 16, correct?

14 MR. EIDELMAN: No. No.

15 THE COURT: Well, I count 12 weeks.

16 MR. EIDELMAN: But because if we say it started on
17 September 1 --

18 THE COURT: No. I am talking about if it started
19 October 22.

20 MR. EIDELMAN: Yes.

21 THE COURT: For sure, you've got a good argument
22 that as of October 22 --

23 MR. EIDELMAN: If it started on October 22,
24 Your Honor, I would agree, if that's the date that it started,
25 then it would have expired on --

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1 THE COURT: January 16. I wrote it down.

2 MR. EIDELMAN: Yes. Correct.

3 THE COURT: And then he was -- wrote the letter he
4 was willing to come back on January 7, whenever it was.

5 MR. EIDELMAN: 17.

6 THE COURT: And he was terminated on the 13th -- the
7 17th --

8 MR. EIDELMAN: No, he was not -- no --

9 THE COURT: Wait a second.

10 The letter that said he was ready to come back, I
11 thought it was January 2?

12 MR. SHEARER: He delivered his positions return to
13 work authorization on January 10.

14 THE COURT: January 10. So your position is that as
15 of January 10, he was ready to come back to work.

16 MR. EIDELMAN: No.

17 MR. DiLORENZO: No.

18 THE COURT: I will ask the plaintiff.

19 MR. EIDELMAN: Sorry.

20 THE COURT: Your position is -- we have to find out
21 whether he was terminated before or after his FMLA rights
22 expired. That's all I am trying to do.

23 MR. SHEARER: His doctor's note said that -- turned
24 in on the 10th, said he could return on the 17th.

25 THE COURT: Okay. So now let's talk about that.

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1 You got the notice on the 7th saying he could return on the
2 17th.

3 MR. SHEARER: Right.

4 THE COURT: He was terminated, notice of termination
5 on January 13, unless I have it wrong.

6 MR. EIDELMAN: That was not notice -- that was -- he
7 was advised at that point in time that his employment would
8 end, effective at the end -- he stayed employed for another
9 six weeks. His last date of employment was the 28th.

10 THE COURT: Was February 28 --

11 MR. EIDELMAN: That's the last date of his
12 employment.

13 THE COURT: -- 2017.

14 MR. EIDELMAN: That is correct.

15 THE COURT: But somebody can be told he's terminated
16 effective three weeks later or four weeks later. But the
17 official notice that he's going to be not be employed was
18 when? January 13, wasn't it?

19 MR. EIDELMAN: Yes. But he -- yes, that is right,
20 Your Honor --

21 THE COURT: Get the dates down.

22 MR. EIDELMAN: I'm sorry?

23 THE COURT: On January 13, he was told he's not
24 going to have a job anymore.

25 MR. EIDELMAN: As of February --

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1 THE COURT: I understand that. But as of January
2 13, he was told he's not going to have a job anymore.

3 MR. EIDELMAN: Yes, Your Honor.

4 THE COURT: All right. So you had the doctor's
5 letter saying he could come back to work on the 17th, right?

6 MR. SHEARER: Right.

7 THE COURT: Okay. And you think that he still was
8 in the FMLA time frame under those circumstances.

9 MR. SHEARER: Yes. Right. His leave expired on --
10 I believe his leave expired on the 16th.

11 THE COURT: What?

12 MR. SHEARER: I believe his leave expired on the
13 16th and he was coming to work on the 17th.

14 THE COURT: Okay. So, look. We are dealing with a
15 day here and a day here. That's okay. I want to get it down
16 right.

17 So we have the facts now in terms of the timelines,
18 right? Okay. Notice of the termination, January 13, 2017.
19 Clear, right? Effective as of February 28, 2017, okay.

20 MR. EIDELMAN: Yes, Your Honor.

21 THE COURT: And if, in fact, he was definitely on
22 leave as of October 22, that his leave expired on January 16.
23 The doctor wrote on January 7 he could come back on January
24 17, right?

25 MR. SHEARER: January 10. He said come back --

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1 THE COURT: January 10 he wrote.

2 MR. SHEARER: Yes.

3 THE COURT: Said he can come back on the 17th.

4 All right. Now, you would rather have his leave
5 start on September 4, right? Because if it started on
6 September 24, then his FMLA rights expired way in advance of
7 their notice of termination.

8 MR. EIDELMAN: That is correct, Your Honor.

9 THE COURT: Okay. Now, there's a regulation -- so
10 it is a fact issue maybe as to whether or not he really
11 started his leave on September 4 or October 22 or whatever.
12 But we have a regulation now that my attention was called to.
13 29 CFR 825.301, subdivision B, called retroactive designation.
14 Are you familiar with that?

15 MR. DiLORENZO: We are, Your Honor.

16 MR. EIDELMAN: We are, Your Honor.

17 MR. SHEARER: Yes, Your Honor.

18 THE COURT: It says: If an employer does not
19 designate leave, as required by 825.300, the employer may
20 retroactively designate leave as FMLA leave, with appropriate
21 notice to the employee.

22 So am I right that you did not designate the leave
23 under 825.300?

24 MR. EIDELMAN: We designated it the very day that we
25 found out that his leave had started earlier.

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1 THE COURT: Okay. You designated it on what date?

2 MR. EIDELMAN: On January 5, the same day that
3 Mr. Barger confirmed that his leave had started and he stopped
4 working.

5 THE COURT: But before then you did not designate
6 it, for whatever reason?

7 MR. EIDELMAN: Not at that date. We had designated
8 previously.

9 MR. SHEARER: They did designate previously.

10 THE COURT: When did they designate it?

11 MR. SHEARER: On December 15, they designated the
12 October 24 through January 16.

13 MR. EIDELMAN: It was -- Your Honor, it was the same
14 protocol, meaning --

15 THE COURT: Stop.

16 MR. EIDELMAN: Sorry.

17 THE COURT: So the designation under the regulation
18 here happened in December, and they designated it as of
19 October 22, is your position, right?

20 MR. SHEARER: That's right. December 15 -- the
21 letter actually says the 24th. That was the weekend --

22 THE COURT: Say the 24th. They designated it.

23 MR. SHEARER: Yes.

24 THE COURT: But they didn't designate it back to
25 September 4, didn't they?

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1 MR. SHEARER: No.

2 THE COURT: And?

3 MR. EIDELMAN: And the reason is, Your Honor, we did
4 the same process that we did with the December date. On
5 December 15, I think it was, we were notified that his leave
6 had started previously, and pursuant to the regulation, we
7 sent the letter on that date advising that his leave started
8 on the 24th. Retroactive, because that's when we got the
9 information.

10 On January 5, when Mr. Barger confirmed that his
11 first date of work -- stopping work was on September 4, they
12 did the exact same thing. They used the regulation, they
13 retroactively designated his leave.

14 THE COURT: So here's what it says. If an employer
15 does not designate leave as required by 825.30, I have to look
16 at that again, the employee may retroactively designate leave
17 with appropriate notice to the employee, as provided by that
18 section, provided that the employer's failure to timely
19 designate leave does not cause harm or injury to the employee.
20 In all cases where leave would qualify for FMLA protections,
21 an employer and an employee can mutually agree that leave be
22 retroactively designated as FMLA leave.

23 I don't think that happened here, right? So we have
24 to consider the application of that provision of the code,
25 okay?

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1 You have your reasons why it never happened, but the
2 truth of the matter is they say it wasn't designated. You
3 knew he was in the hospital and you didn't designate it,
4 right?

5 MR. EIDELMAN: Well, no, no, no. No. What the
6 testimony has been is that the company allowed Mr. Barger to
7 stay on the payroll starting on September 4 at full leave.
8 And then we know what happened with the company determining,
9 in November, after Mr. Barger came forward and said "I need to
10 have more surgery," et cetera, that that was the time to go
11 out on leave. He gets his paperwork. His doctor -- it was
12 his responsibility to get his paperwork in. And, in fact,
13 what the regulations say, that you normally get 15 days to get
14 in your paperwork, and then you cannot even be eligible for
15 FMLA. They let it go a lot longer. On December 15, almost
16 three weeks later, his doctor --

17 THE COURT: I know you are on top of the 742
18 exhibits, okay. I get it.

19 Let me ask you a couple of questions.

20 MR. EIDELMAN: Certainly.

21 THE COURT: It seems to me that you knew he was in
22 the hospital on September 4.

23 MR. EIDELMAN: We did.

24 THE COURT: Just one second. I mean, I don't have
25 as complicated a mind as you have.

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1 You knew he was in the hospital on September 4,
2 right? All sorts of testimony that he was being operated on
3 and that he was being visited and you cared about him,
4 et cetera, et cetera, right? But for whatever reason, you
5 never designated September 4 as the time that his leave would
6 start, even though you knew that he was hospitalized, even
7 though you knew he was undergoing serious surgery, right? So
8 you had knowledge of that.

9 MR. EIDELMAN: Correct. Yes.

10 THE COURT: I understand later on all these letters
11 came, and I get it. Right?

12 So one of the ways I can present this case to the
13 jury is to let them decide, I guess, is the factual matter
14 whether September 24 was the date of the leave, and I can
15 decide the leave issue later on, I imagine.

16 My initial reaction is that legally you were out to
17 lunch here on this case because you had all sorts of knowledge
18 of the circumstances and you never designated him, okay. But
19 I don't think I have to make that determination. Maybe the
20 jury will spare us of that, right?

21 So that's what I am thinking of right now. Now, you
22 can go back to your 742 exhibits if you want to. I am just
23 trying to logically explain this to the best of my ability,
24 okay.

25 I think you've got a problem there under that

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1 section, is my general sense. So I understand you have all
2 these events and all these letters and all these doctors, but
3 it doesn't seem to me as if you could not have designated him,
4 according to the Labor Law provisions, back to September 4.

5 MR. EIDELMAN: Under --

6 THE COURT: In October, the end of September? I
7 mean, you knew this guy was in the hospital.

8 MR. EIDELMAN: Your Honor, I understand the Court's
9 position. We actually -- I mean --

10 THE COURT: It is a matter of law, I am talking
11 about. It is an issue of law.

12 MR. EIDELMAN: It is an issue of law as to -- well,
13 if it is an issue of law, then it would appear to me that the
14 facts are undisputed that based on what Mr. Barger then
15 told -- I understand the point that we did not designate it on
16 September 4. And there was testimony from our witnesses as to
17 why we didn't do it that way at that time.

18 THE COURT: Well, you designated on September 10.
19 You didn't designate on September 20, you didn't designate it
20 on October 1. And your position is this guy was not able to
21 return to work.

22 MR. EIDELMAN: But I am not sure, Your Honor, from a
23 logical perspective, what is the difference between it being
24 designated on December 22, when we get the note from his
25 doctor. We didn't designate it on September 22 until we got

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1 the note from the doctor.

2 THE COURT: I don't think you needed a note from the
3 doctor to designate here.

4 Look. We will see how it all fleshes out. I am not
5 so sure that this is not an issue of law that September 4 is
6 not the trigger date. But we're going to let the jury decide
7 it, perhaps, factually, right? And, in any event, if they do
8 decide that September 24 was the date, and if the law, you
9 know, does not foreclose you from arguing this, then I guess
10 his leave rights expired well in advance of the time he was
11 discharged, right? Yeah.

12 MR. EIDELMAN: We would think it would be a factual
13 question under that scenario, Judge.

14 THE COURT: I am going to think about it. But we
15 have to have an open discussion, okay? So I think we are
16 getting close to crunching here.

17 Now, what we are going to do here is that you be a
18 little patient, and we are going to get a proposed charge to
19 you before the weekend so you can have a nice weekend, and it
20 is going to be a draft. It will be a track -- a lot of what
21 we have been speaking about over the last day or so, okay.

22 And then you will have an opportunity to look at it
23 and memorize it over the weekend, and we can talk more about
24 it. But at least you will have a pretty good idea about how
25 you are going to argue your case to the jury. And I want you

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1 to make sure that you have enough information so we can have
2 an intelligent argument. Fine tuning the charge we will do,
3 all right.

4 And I am willing to listen to whatever substantive
5 things you want me to consider. But my game plan is to have
6 you, Mr. Shearer, finish up your deposition testimony,
7 whatever.

8 As far as I am concerned, we have gone way off the
9 rails here. I've allowed you to do it. Good law firms do
10 that. And I sort of was a little bit permissive here, but we
11 are where we are anyway, right? We didn't handle such
12 complicated cases in Suffolk County. It's taken me 24 years
13 to get in touch with how you do it in New York City, okay?
14 But I am still trying to learn.

15 So you will have the proposed charge. You can look
16 at it and we can talk about it. I think that the guts of what
17 we're talking about will be in it, and we can talk more on
18 Monday morning. But, hopefully, you will be able to sum up on
19 Monday, okay? That's what I want you to be able to do.
20 That's why I want you to see the draft of the charge before
21 you leave today, okay? Because I don't want the jury to come
22 back for a half hour and then have to come back again on
23 Tuesday, okay?

24 So be prepared to sum up. You understand where you
25 are going. I think I know where you are going now, right?

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1 And I think you understand where I am coming from,
2 Mr. Eidelman, and we will think about whether that provision
3 of the labor law, as a matter of law, precludes you from
4 arguing that September 4 was the date or not. We will talk
5 about it later, okay? But you know where I am coming from at
6 least. That's the important thing, all right?

7 Now, having said everything I've said, I have great
8 respect for the lawyering. You people worked very hard. Your
9 clients should be most grateful, the efforts you put in.
10 High-end lawyering. I am not willing to have you walk out of
11 this courtroom thinking that I am denigrating your talents. I
12 have my own style, you have your own style, whatever it is. I
13 respect the fact that you tried so hard.

14 Would I have put in 700 exhibits when I was
15 practicing law in Suffolk County? I don't know. We couldn't
16 count that high in those days, right? But that's what you
17 decided to do and you spent a lot of time doing it, and maybe
18 it was appropriate. But I think we have enough, okay.

19 And we will look forward to your deposition. Do you
20 think it is going to really be necessary? Is this something
21 you have spoken about today?

22 MR. SHEARER: One of them, yes. There's some
23 pretext towards the RIF or whether he was in it.

24 THE COURT: Well, it is all pretext. Ultimately, I
25 think it is going to come down to whether the jury believes

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1 there was a legitimate reduction in force here. I think
2 that's what it's going to come down to.

3 MR. SHEARER: And that's what this -- one of these
4 depositions is going to say.

5 THE COURT: I don't know what spreadsheets have to
6 do with it all. Maybe it's somewhat relevant, but it seems to
7 be marching far afield here.

8 Okay. Anything you want to say before we leave?

9 MR. DiLORENZO: Your Honor, one thing.

10 THE COURT: Yes.

11 MR. DiLORENZO: This damage testimony that went in
12 from the plaintiff.

13 THE COURT: Damage testimony?

14 MR. DiLORENZO: I don't know how he did it, what he
15 did. We don't have the program.

16 THE COURT: Well, you know, look. I think it is --
17 I didn't pay a lot of attention to it. He tossed out some
18 numbers. Let the jury wrestle with that. I can always set it
19 aside afterwards. I would rather get everything we can from
20 the jury, and I can always deal with it afterwards, I think.
21 I think I am more comfortable doing that, than knocking it out
22 of the box.

23 What do you say?

24 MR. SHEARER: I agree.

25 THE COURT: I think there's -- Mr. DiLorenzo has a

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1 lot here that I tend to agree with. I mean, it seems
2 speculative, a little fuzzy. Not so sure you really -- you
3 know, you didn't have an expert testify. I'm not so sure I
4 was impressed with that whole dynamic, but I don't know. You
5 want to tell me specifically why you don't think we should let
6 the jury decide damages?

7 MR. SHEARER: Yes. I think he's a 30-year veteran
8 of Wall Street that can calculate interest and what he made.

9 MR. DiLORENZO: That's not what I am arguing.

10 THE COURT: What are you --

11 MR. DiLORENZO: What I'm arguing is that he gave
12 testimony that hit the ball. He told me he didn't know how he
13 calculated the 900,000, he didn't know what the offset was.
14 His projection of seven years was incredibly speculative,
15 based on changing the culture at another company. I mean, I
16 want on the record a motion to strike all of his testimony on
17 damages.

18 THE COURT: I am not going to do that.

19 MR. DiLORENZO: I will do it however you want.

20 THE COURT: Let's see what the jury says, because I
21 may agree with you eventually. It is great when you have a
22 verdict to look at and we have the record and I can toss it
23 out afterwards. I have done that type of thing before. But I
24 just want to get a complete record here. Anything else?

25 MR. DiLORENZO: No.

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1 MR. SHEARER: No.

2 MR. DiLORENZO: Your Honor, we just still have the
3 individual defendants.

4 THE COURT: To do -- they are in the case.

5 MR. DiLORENZO: Yes.

6 THE COURT: I am not --

7 MR. DiLORENZO: Our position is no reasonable jury
8 based on this record could --

9 THE COURT: We are going to let the jury decide
10 that. They are going to decide whether they were in control
11 of Mr. Barger under that multi-factor test, you know, as to
12 whether there's control or not. Let them wrestle with it. We
13 will see what happens after that. Anything else?

14 MR. SHEARER: No, Your Honor.

15 THE COURT: All right. So just wait. I should have
16 a draft charge to you within the hour, all right. And I want
17 you to have it before you leave.

18 (WHEREUPON, at 4:39 p.m., the proceedings were
19 adjourned until 10:00 a.m., September 23, 2019.)

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